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No. _____

In The

Supreme Court of the United States

October Term, 1997

JOHN M. BARGE and OLIVIA L. BARGE,

Petitioners,

v.

ST. PAUL FIRE AND MARINE INSURANCE CO.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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120 pp

QUESTION PRESENTED

Can a party assert a creditor's violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, as an affirmative defense to the creditor's action to collect a debt.

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PETITION FOR WRIT OF CERTIORARI

Petitioners John M. Barge and Olivia L. Barge pray for a writ of certiorari to review denial of the writ of certiorari by the Georgia Supreme Court. The Georgia Supreme Court refused to review the judgment of the Georgia Court of Appeals entered on February 27, 1997. The Georgia Court of Appeals affirmed the trial court's denial of petitioners' request for declaratory judgment that the underlying credit agreements signed by Mrs. Barge were void against her because the agreements were procured in violation of the Equal Credit Opportunity Act. The Georgia Supreme Court denied certiorari on June 27, 1997.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported at 483 S.E.2d 883 (1997) and is reproduced in the Appendix at B. 2a. The order of the Georgia Court of Appeals denying petitioners' request for rehearing is unreported and is reproduced in the Appendix at D. 23a. The order of the Georgia Supreme Court of June 27, 1997 denying certiorari is unreported and is reproduced in the Appendix at A. 1a.

JURISDICTION

On June 19, 1996 the Superior Court of Fulton County ("trial court") granted the respondent a certificate of immediate review to appeal its order issued June 10, 1996.

H. 67a. The petitioners cross-appealed the trial court's September 8, 1995 order denying petitioners' declaratory relief. I. 69a. The decision of the Georgia Court of Appeals affirming the trial court's September 8, 1995 order and reversing the trial court's June 10, 1996 order was entered February 27, 1997. B. 2a. The Georgia Court of Appeals denied petitioners' timely filed petition for rehearing on March 12, 1997. D. 23a. The Georgia Supreme Court denied certiorari on June 27, 1997. A. 1a. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1988).

STATUTE AND REGULATION INVOLVED

The Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691-1691f (1982 & Supp. I 1997), and 12 C.F.R. § 202.7(d) (1995) are reproduced in the Appendix at E. 24a.

STATEMENT OF THE CASE

A. Statement of Facts

John M. Barge ("Barge") was the Chief Executive Officer of Barge-Wagener, Inc. ("BWI") n/k/a 1815 Exchange, Inc. M. 91a. BWI was a general contractor for a number of construction projects throughout the southeastern United States. Respondent St. Paul Fire and Marine Insurance Company ("St. Paul") issued performance and payment surety bonds for several of BWI's construction projects. K. 77a; M. 92a. In connection with the issuance of certain

bonds, St. Paul required Mr. Barge and his wife Olivia L. Barge (collectively, the "petitioners") to execute a General Agreement of Indemnity dated November 26, 1993 ("Indemnity Agreement"). The Indemnity Agreement required petitioners to indemnify St. Paul for any losses on the bonds. St. Paul also required Mrs. Barge to sign the Indemnity Agreement as a condition of its extending credit to BWI, her husband's company.

Mrs. Barge is a homemaker. She has never been an officer, director, or shareholder of BWI. M. 97a. Mrs. Barge has never possessed any ownership interest in BWI, nor has she participated in the day-to-day management or operation of BWI. J. 74a. Mrs. Barge's only connection to BWI was her status as the wife of its chief executive officer, John Barge. In connection with execution of the Indemnity Agreement, Mrs. Barge did not submit any personal financial information to respondent, nor was any information specific to Mrs. Barge requested. J. 74a. Respondent did not conduct any credit investigation to determine Mrs. Barge's creditworthiness. J. 74a.

Respondent specifically excluded from the Indemnity Agreement the assets owned exclusively by Mrs. Barge, including the family residence. Thus, respondent did not rely upon any determination of Mrs. Barge's creditworthiness when deciding whether to extend credit to BWI and John Barge. St. Paul admits that the only reason it required Mrs. Barge to sign the Indemnity Agreement was to prohibit BWI, BWI's affiliates, and John M. Barge from transferring assets which would otherwise be available to St. Paul in the event of default to Mrs. Barge. L. 88a. St. Paul was admittedly relying solely on the assets of BWI and John Barge to meet the obligations owed to it. L. 88a.

In early 1994, BWI experienced financial difficulties which caused it to default on several construction contracts for which St. Paul had issued performance or payment bonds. On May 18, 1994, BWI and St. Paul entered into a second agreement ("May 18 Agreement") pursuant to which St. Paul agreed to inject additional capital into BWI to ensure the completion of several construction projects. F. 54a. St. Paul had the obligation to complete the projects pursuant to the payment and performance bonds, and elected to fulfill this obligation by funding BWI and having BWI complete the projects. St. Paul required Mrs. Barge to execute the May 18 Agreement thereby encumbering her personal assets to guaranty the obligations of BWI. Prior to entering into the May 18 Agreement, respondent prepared no financial report and conducted no credit review regarding Mrs. Barge. K. 84a.

B. History of Proceedings

On January 25, 1995, St. Paul filed a demand for arbitration against the Barges before the American Arbitration Association claiming that the Barges had received income tax refunds in violation of the May 18 Agreement. According to St. Paul, the dispute was subject to the arbitration clause in the May 18 Agreement. On February 10, 1995, petitioners filed a Complaint for Declaratory Judgment and Application for Stay of Arbitration in the Superior Court of Fulton County seeking, in addition to other relief, an order declaring that the Indemnity Agreement and the May 18 Agreement were unenforceable

against Mrs. Barge as a matter of law because of St. Paul's violation of the ECOA. F. 48a; G. 63a.

Petitioners allege that St. Paul violated the ECOA regulation which states that "a creditor shall not require the signature of an applicant's spouse . . . on any credit instrument if the applicant qualifies under the creditor's standards for creditworthiness for the amount and terms of credit requested." E. 46a. St. Paul never determined that BWI or Mr. Barge failed to qualify under its standard for creditworthiness. In addition, St. Paul never conducted any evaluation of Mrs. Barge's creditworthiness prior to requiring her signature on the Indemnity Agreement or the May 18 Agreement as a condition of extending credit to BWI. J. 73a. Therefore, petitioners sought declaratory relief for St. Paul's violation of this regulation. The ECOA provides for declaratory relief in 15 U.S.C. § 1691e(c) which states, in part, that "[u]pon application by an aggrieved applicant, the appropriate United States District Court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter." E. 40a.

On March 31, 1995, St. Paul answered the complaint and asserted counterclaims against the Barges. On September 8, 1995, the trial court entered an order denying all of the relief sought by the Barges in their complaint. C. 11a. Specifically, the trial court denied petitioners' request for declaratory judgment that the Indemnity Agreement and the May 18 Agreement were unenforceable against Mrs. Barge. C. 16a. The trial court determined that "the statutory scheme [of the ECOA] did not

provide, either directly or indirectly, for the invalidation of a debt under an agreement as a remedy for an ECOA violation." C. 13a. The trial court stated that "the weight of the authority is not to allow an ECOA claim to be asserted defensively." C. 13a.

Thereafter, on June 19, 1996, the trial court granted St. Paul a certificate of immediate review to appeal its order of June 10, 1996 related to other issues in the case. H. 67a. The petitioners cross-appealed the September 8, 1995 order in which the trial court denied petitioners' request for declaratory judgment that the Indemnity Agreement and May 18 Agreement were unenforceable against Mrs. Barge. I. 69a.

On February 27, 1997, the Georgia Court of Appeals affirmed the trial court's September 8, 1995 order which denied petitioners' request for declaratory relief. The Court of Appeals stated that "[t]he trial court did not err in holding that any alleged violation of the ECOA was not a defense to Mrs. Barge's liability, and that she was thus compelled to arbitrate her disputes." B. 9a. The Court of Appeals erroneously explained that Mrs. Barge could only assert the ECOA violation as a compulsory counterclaim, not as an affirmative defense. B. 8a. This interpretation eliminates the prescribed remedy of declaratory relief provided in 15 U.S.C. § 1691e(c). E. 41a.

The Georgia Court of Appeals relied upon its earlier decision in *Rodgers v. First Union Nat'l Bank*, 470 S.E.2d 246 (1996), *reh'g denied*, 220 Ga. App. 914 (1996). B. 8a. In *Rodgers*, the Georgia Court of Appeals held that "an alleged violation of 15 U.S.C. § 1691 et seq. and 12 C.F.R.

202.7(d)(1) cannot be asserted as an affirmative defense to void a guaranty, but only as a compulsory counterclaim." 470 S.E.2d at 248 (citations omitted). In *Rodgers*, First Union required Rodgers to personally guarantee two notes issued to Maitland, a company of which Rodgers was president. Rodgers claimed that First Union acted discriminatorily by requiring him to guaranty the notes without making "a preliminary determination of the creditworthiness of Maitland." *Id.* The *Rodgers* opinion specifically rejected the rationale of the Third Circuit in *Silverman v. Eastrich Multiple Investor Fund*, 51 F.3d 28, 33 (3d Cir. 1995), that an ECOA violation is an affirmative defense to a creditor's action seeking to collect a debt from an aggrieved spouse. 470 S.E.2d at 249. Instead, the *Rodgers* court relied on the decisions in *CMF Virginia Land v. Brinson*, 806 F. Supp. 90 (E.D. Va. 1992), and *Diamond v. Union Bank & Trust*, 776 F. Supp. 542, 544 (N.D. Okla. 1991), in denying Rodgers' right to assert an ECOA violation as an affirmative defense. 470 S.E.2d at 248.

The Barges' motion for rehearing in the Georgia Court of Appeals was denied on March 12, 1997. D. 23a. The Georgia Supreme Court denied the Barges' timely filed petition for writ of certiorari on June 27, 1997. A. 1a.

REASONS FOR GRANTING THE WRIT

The decision of the Georgia Court of Appeals denying the Barges' request for declaratory relief conflicts with decisions by other state and federal courts which allow the defensive application of the ECOA. The Court should grant certiorari to interpret what federal statutory

rights the ECOA grants to aggrieved spouses, thereby eliminating any division among state and federal courts.

I. GEORGIA COURTS' INTERPRETATION OF THE ECOA'S REMEDIES CONFLICTS WITH OTHER STATE AND FEDERAL COURT DECISIONS.

Congress enacted the ECOA based on its finding that "there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status." Pub. L. 93-495, § 502 (Congressional Findings and Statement of Purpose). To aid in fulfilling this purpose, the ECOA provides that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . marital status." E. 24a.

The Federal Reserve Board pursuant to 15 U.S.C. § 1691b(a)(1) has imposed certain regulations to carry out the purposes of the ECOA. One such regulation provides that "a creditor shall not require the signature of an applicant's spouse . . . on any credit instrument if the applicant qualifies under the creditor's standards for creditworthiness for the amount and terms of credit requested." E. 46a. The ECOA also provides for relief when a creditor violates the ECOA, stating that "[u]pon application by an aggrieved applicant, the appropriate

United States District Court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter." E. 41a.

When St. Paul agreed to provide BWI with performance and payment surety bonds on BWI construction projects, St. Paul did not request any financial information from Mrs. Barge. J. 73a. In addition, St. Paul made no determination that BWI and Mr. Barge failed to meet its standards of creditworthiness for the amount and terms of credit they requested. Nevertheless, St. Paul required Mrs. Barge, who had never been a shareholder, officer or director of BWI, to sign the Indemnity Agreement as a condition of extending credit to BWI, her husband's company. J. 74a. The Indemnity Agreement, however, failed to encumber the assets held solely by Mrs. Barge, including, among other assets, the family residence. L. 88a. St. Paul admits that the reason for obtaining Mrs. Barge's indemnity was "so that the assets being relied upon in the extension of credit would not be depleted by gifts or other transfers from BWI, BWI's affiliates, or John M. Barge to Olivia L. Barge." L. 88a. St. Paul also did not evaluate or investigate Mrs. Barge's credit prior to requiring Mrs. Barge to sign the May 18 Agreement. The May 18 Agreement encumbered Mrs. Barge's personal assets for the obligations of BWI.

By requiring Mrs. Barge to sign the Indemnity Agreement and the May 18 Agreement without first making a determination that Mr. Barge and BWI did not meet its creditworthiness standards, St. Paul violated ECOA regulations. Mrs. Barge was forced to sign as a guarantor of the debts of BWI and Mr. Barge solely because of her status as

Mr. Barge's spouse. The intent of the ECOA is to prohibit creditors such as St. Paul from discriminating on the basis of marital status. However, the ruling by the Georgia Court of Appeals denies Mrs. Barge the right to assert the St. Paul's ECOA violation as an affirmative defense. Unless Mrs. Barge is allowed to assert the ECOA violation as an affirmative defense, St. Paul's unlawful and discriminatory act will be condoned. St. Paul will be allowed to recover against Mrs. Barge, who was unlawfully required to sign the credit agreement.

Contrary to the opinion of the Georgia Court of Appeals, the highest courts in Virginia and Maine and the Third Circuit have held that an aggrieved spouse may assert an ECOA violation as an affirmative defense to an action to recover under a credit agreement. These decisions demonstrate a split among jurisdictions as to the correct interpretation of the remedies available to an aggrieved spouse under the ECOA.

A. State Court Decisions are in Conflict with Georgia's Interpretation of the ECOA

The Supreme Court of Virginia in *Eure v. Jefferson Nat'l Bank*, 448 S.E.2d 417, 421 (1994), held that the basic principle of contract law, that contracts executed in violation of the law should not be enforced,[1] applied to violations of the ECOA. The Virginia court stated:

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[1] *See Kaiser Steel Corp v. Mullins*, 455 U.S. 72, 81 n.7, 102 S. Ct. 851, 858 n.7, 70 L. Ed. 2d 833 (1982) (holding a contract procured in violation of federal antitrust and labor laws will render the contract unenforceable, even if the federal law did not specifically authorize such use of the statute as a defense).

> To deny [the aggrieved spouse] the right to use the ECOA violation defensively would be to enforce conduct that is forbidden by the Act. Such use, therefore, would not be contrary to the will of Congress or in any manner inconsistent with or derogatory of the remedy specifically provided by the Act. Indeed, to permit such use would give effect to the clear legislative intent to deter discrimination in the particular area of endeavor regulated by the ECOA.

448 S.E.2d at 419.

The Virginia Supreme Court distinguished the two prior Virginia federal district court decisions, *Riggs Nat'l Bank of Washington, D.C. v. Linch*, 829 F. Supp. 163, 169 (E.D. Va. 1993), *aff'd on other grounds*, 36 F.3d 370 (4th Cir. 1994) and *CMF Virginia Land v. Brinson*, 806 F. Supp. 90, 95 (E.D. Va. 1992), which held that an aggrieved party could not assert a creditor's ECOA violation as an affirmative defense. *Id.* at 419. The *Eure* court noted that in the federal district cases the primary debtor and the aggrieved spouse both sought to assert the ECOA violation as an affirmative defense; whereas in *Eure* only the spouse sought affirmative relief. The *Eure* court endorsed the petitioner's argument that:

> "Allowing only [the aggrieved spouse] to escape liability on an instrument executed solely as a result of an ECOA violation would further the goals of ECOA to deter discrimination in credit transactions while reinforcing the necessary expectations that primary debtors, debtors who

> have received the benefits of the loan, will remain liable for repayment of the debt."

Id. (quoting petitioner's brief).

The Supreme Judicial Court of Maine also interpreted the ECOA to include the right of aggrieved parties to assert a violation of the ECOA as an affirmative defense. *Machias Savings Bank v. Ramsdell*, 689 A.2d 595 (Me. 1997); *Mundaca Investment Corp. v. Emery*, 674 A.2d 923 (Me. 1996). In *Machias Savings Bank*, the wife of a loan applicant had previously filed suit against Machias Savings Bank to recover for violations of the ECOA. 689 A.2d at 597. The federal court had dismissed the wife's suit because the two year statute of limitations had run. *Id.* However, the *Machias Savings Bank* court allowed the wife to assert the ECOA violation as an affirmative defense to the bank's foreclosure action, despite the federal court's ruling in the related action. *Id.* at 598. In *Mundaca*, the court held that "[t]he allegation of an ECOA violation may be asserted as an affirmative defense to the liability on the debt by either the applicant or the spouse." 674 A.2d at 925.

B. The Third Circuit Disagrees with Georgia's Interpretation of the ECOA

In *Silverman v. Eastrich Multiple Investor Fund*, 51 F.3d 28, 33 (3rd Cir. 1995), the Third Circuit held that an aggrieved spouse "may have a valid defense and obtain relief from her obligations" under a credit agreement if the creditor caused her to sign the credit agreement in violation of the ECOA. The Third Circuit stated that

"[t]his interpretation of the statute best forwards its purposes, particularly in light of the inclusion of a broad remedial provision, Section 1691e(c), in the ECOA." *Id.* (footnote omitted). The Third Circuit found that its interpretation of the ECOA was consistent with Congress' purpose in enacting the ECOA and noted that:

> "Congress – in enacting the ECOA – intended that creditors not affirmatively benefit from proscribed acts of credit discrimination. To permit creditors – especially sophisticated credit institutions – to affirmatively benefit by disregarding the requirements of the ECOA would seriously undermine the congressional intent to eradicate gender and marital status based credit discrimination."

Id. (quoting *Integra Bank/Pittsburgh v. Freeman*, 839 F. Supp. 326, 329 (E.D. Pa. 1993)). The Third Circuit further explained that:

> "This rule places a creditor in no worse position than if it had adhered to the law when the credit transaction occurred. A creditor may not claim to have relied factually upon a guarantor's assets if it has never requested nor received financial information regarding them. Further, a creditor may not claim legal reliance on a signature that was illegally required in the first instance."

Id. (quoting *Integra*, 839 F. Supp. at 329).

The Third Circuit is the only circuit which has directly considered the question presented to this Court. However, numerous federal district courts have considered this question and determined that an aggrieved spouse may assert an ECOA violation as an affirmative

defense. *See Sony Electronics, Inc. v. Putnam*, 906 F. Supp. 228 (D.N.J. 1995) (relying on *Silverman*); *F.D.I.C. v. Medmark, Inc.*, 897 F. Supp. 511 (D. Kan. 1995) (adopting specifically the rationale in *Silverman*); *In re Farris*, 194 B.R. 931 (Bankr. E.D. Pa. 1996); *Sharp Electronic Corp. v. Uriel Yoggev*, Civ. A. No. 94-5652, 1995 WL 263533, at *2 (E.D. Pa. 1995); *American Security Bank v. York*, Civ. A. No. 91-1212(GHR), 1992 WL 237375, at *3 (D.D.C. 1992) ("[T]his court is unprepared, in the face of the broadly remedial language of section 1691e(c), to say that such a defense must fail as a matter of law."). *Contra F.D.I.C. v. Edwardsville, Inc.*, 873 F. Supp. 1474 (D.C. Kan. 1995); *Riggs Nat'l Bank of Washington, D.C. v. Linch*, 829 F. Supp. 163 (E.D. Va. 1993); *CMF Virginia Land v. Brinson*, 806 F. Supp. 90 (E.D. Va. 1992); *Diamond v. Union Bank and Trust of Bartlesville*, 776 F. Supp. 542 (N.D. Okl. 1991).

II. THE DETERMINATION OF THE RIGHTS AFFORDED TO AGGRIEVED PARTIES UNDER THE ECOA IS IMPORTANT.

Both the highest state courts of Virginia and Maine and one federal circuit court have failed to resolve an important federal question uniformly. Because the highest state courts are not bound by the federal circuit courts' interpretation of a federal statute, only this Court can eliminate the discrepancy among the state and federal courts concerning the proper application of the ECOA.[2]

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[2] *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617, 109 S. Ct. 2037, 2045, 104 L. Ed. 2d 696 (1989) ("state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction,

Disagreement among the courts enables a litigant to forum shop for the jurisdiction which has a favorable interpretation of the ECOA. This Court disapproves of forum shopping. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 70-71, 58 S. Ct. 817, 818, 82 L. Ed. 1188 (1938); *Hanna v. Plumer*, 380 U.S. 460, 467, 85 S. Ct. 1136, 1142, 14 L. Ed. 2d 8 (1965); *Salve Regina College v. Russell*, 499 U.S. 225, 234, 111 S. Ct. 1217, 1222, 113 L. Ed. 2d 190 (1991). For example, a party in Virginia whom a creditor forced to sign a guaranty in violation of the ECOA will be able to escape liability for the underlying debt in state court, but may be fully liable in federal court. This Court is empowered to eliminate forum shopping by defining the rights that the ECOA affords to aggrieved parties so that all forums will recognize the same rights.

In addition, the rights granted under a federal statute are a matter of great concern, gravity and importance. The purpose of the ECOA is to promote equal rights in the economic arena; a promise that cannot be fulfilled so long as the present division of authority remains. As such, this Court has a responsibility to ensure that all United States citizens benefit equally from these statutory rights.

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to render binding judicial decisions that rest on their own interpretations of federal law"); *Lockhart v. Fretwell*, 506 U.S. 364, 375-376, 113 S. Ct. 838, 845-846, 122 L. Ed. 2d 180 (1993) (Thomas, J., concurring) (stating that state courts are not required to follow rulings by federal courts of appeals on questions of federal law).

CONCLUSION

The question presented here is whether an aggrieved spouse may assert a violation of the ECOA as an affirmative defense to a creditor's action to collect a debt. The Georgia Court of Appeals decided this important federal question in a manner contrary to decisions by the highest courts in Virginia and Maine and contrary to the Third Circuit. The Georgia Supreme Court refused to grant certiorari to reverse the Georgia Court of Appeals' improper denial of this important federal right. The resulting split among jurisdictions allows for forum shopping by potential litigants, especially in jurisdictions where the state and federal courts disagree on the ECOA interpretation. This Court has the power to eliminate this inconsistency by deciding whether an aggrieved spouse may assert an ECOA violation as an affirmative defense. For these reasons, the petitioners respectfully request that the Court grant this petition for writ of certiorari.

Respectfully Submitted,

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APPENDIX A

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

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DATE: June 27, 1997

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Case No. S97C1088

JOHN M. BARGE et al. V. ST. PAUL FIRE AND MARINE INSURANCE COMPANY

COURT OF APPEALS CASE NO. A97A0466 A97A0467

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

APPENDIX B

THIRD DIVISION
POPE, P. J.,
JOHNSON and BLACKBURN, JJ.

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

February 27, 1997

In the Court of Appeals of Georgia

A97A0466, A97A0467. ST. PAUL FIRE & MARINE INSURANCE COMPANY v. BARGE et al.; and vice versa.

BL-027

BLACKBURN, Judge.

In Case No. A97A0466, St. Paul Fire & Marine Insurance Company (St. Paul) appeals an order of the trial court staying arbitration proceedings with respect to certain issues. In Case No. A97A0467, John M. Barge and Olivia L. Barge appeal an earlier order of the trial court requiring arbitration of other issues.

St. Paul issued payment and performance surety bonds in favor of Barge-Wagener, Inc. (BWI) in connection with several construction projects undertaken by BWI. BWI's CEO, John M. Barge, and his wife, Olivia L. Barge, executed an indemnity agreement pursuant to which they agreed to indemnify St. Paul for any losses it sustained under the bonds.

After experiencing construction difficulties, BWI sought funding from St. Paul to complete the bonded

projects. On May 18, 1994, St. Paul, BWI, the Barges, and others entered into an agreement (the May 1994 agreement) in which St. Paul agreed to advance funds to BWI for completion of the projects. The Barges also assigned to St. Paul their interest in certain federal and state tax refunds due them. The agreement required that all disputes arising out of or in connection with the agreement be resolved through arbitration.

After execution of the May 1994 agreement, a dispute arose between the parties as to whether certain tax refunds received by the Barges should be paid to St. Paul. St. Paul initiated arbitration proceedings over this dispute before the American Arbitration Association. The Barges filed an action in Fulton County Superior Court seeking a stay of the arbitration proceedings and a declaratory judgment that arbitration was not required. They also sought a declaration that any lien or security interest in the tax refunds purportedly granted by Ms. Barge was void because St. Paul had violated the Equal Credit Opportunity Act (ECOA) in requiring Ms. Barge to be a party to the agreement. The Barges later amended the complaint to seek a declaration that the original indemnity agreement and the May 1994 agreement were not enforceable against Ms. Barge due to the alleged ECOA violations.

St. Paul filed its answer on March 31, 1995, and asserted the two-count counterclaim against the Barges. The first count alleged that the Barges had breached the May 1994 agreement by failing to pay St. Paul the tax refunds they had received. Count two alleged that the Barges were liable to St. Paul for amounts advanced pursuant to the May 1994 agreement. This count alleged

that more then $11,800,000 had already been advanced, and that it was anticipated that additional advances would cause the Barges' liability to exceed $20 million. The counterclaim recited that it was filed subject to and without waiver of St. Paul's claim that all disputes were arbitrable.

On September 8, 1995, the court entered an order finding that the tax refund dispute was subject to arbitration. In connection with this ruling, the court rejected Ms. Barge's argument that she was not obligated under the agreement due to St. Paul's alleged ECOA violations. The Barges filed a notice of direct appeal of this order, and St. Paul moved to dismiss the appeal on the grounds that the order was not directly appealable since St. Paul's counterclaims remained pending. The trial court agreed and dismissed the notice of appeal.

On May 17, 1996, St. Paul sought to amend its arbitration demand to bring the $20 million claim within the arbitration proceedings. The Barges then filed a renewed motion in superior court to stay the arbitration proceedings. On June 10, 1996, the court entered an order finding that St. Paul had waived its right to arbitrate the $20 million claim and ordering the arbitrators not to hear such claim.

Case No. A97A0466

1. In several enumerations, St. Paul contends the court erred in holding that it waived its right to arbitrate the $20 million claim. "An agreement to arbitrate is waived by any action of a party which is inconsistent

with the right of arbitration." (Punctuation omitted.) *Tillman Group v. Keith,* 201 Ga. App. 680, 681 (2) (411 SE2d 794) (1991). The trial court held that St. Paul waived its right to require arbitration of the $20 million claim by seeking to dismiss the Barges' notice of direct appeal due to the pendency of St. Paul's counterclaims. The court found that "it was inconsistent with its right to arbitrate the 20 million dollar claim for [St. Paul] to use the fact that it had not demanded arbitration on the 20 million dollar claim as a means to dismiss [the Barges'] appeal."

The trial court erred in finding that St. Paul's actions in seeking dismissal of the notice of appeal were inconsistent with its right to arbitrate the $20 million claim. As an initial matter, direct appeal of the court's September 8, 1995, order would have been inappropriate regardless of whether St. Paul had demanded arbitration of the $20 million claim. An order granting or denying a motion to stay judicial proceedings pending arbitration is an interlocutory order and is reviewable only by application. See *Phillips Constr. Co. v. Cowart Iron Works,* 250 Ga. 488 (299 SE2d 538) (1983); *McAllaster v. Merrill Lynch & Co.,* 212 Ga. App. 697 (443 SE2d 9) (1994); *Pace Constr. Corp. v. Northpark Assocs.,* 215 Ga. App. 438 (450 SE2d 828) (1994). Whether or not St. Paul had demanded arbitration of the $20 million claim is irrelevant to the question of whether the court's order was directly appealable. Thus, St. Paul cannot be said to have "used" the fact that it had not demanded arbitration of the $20 million claim to have the notice of appeal dismissed.

Furthermore, nothing St. Paul *did* in seeking dismissal of the notice of appeal was inconsistent with its right to arbitrate the $20 million claim. St. Paul argued

correctly that direct appeal was inappropriate because of the pendency of its counterclaims in superior court. St. Paul also noted that it had not yet demanded arbitration of the $20 million claim; that the Barges were likely to resist any attempt to arbitrate such claim and that St. Paul would thus be forced to seek an order compelling arbitration; and that circumstances could change and St. Paul could decide at a future date to forego arbitration and have such claim determined in superior court. These statements are not inconsistent with the right to arbitrate such claim, but merely note that no action has been taken other than the filing of the counterclaim.

The fact that St. Paul did not demand arbitration of the $20 million claim at the time it filed its counterclaim is also not inconsistent with its right to arbitrate such claim. As the Barges admit in their appellate brief, the $20 million claim had not fully matured at the time St. Paul filed its counterclaim. St. Paul did not demand arbitration on its claim for amounts due under the May 1994 agreement because it had not yet fully advanced all funds due thereunder, and the full amount of the Barges' liability could not be determined. Nevertheless, St. Paul was compelled to file the counterclaim to protect itself in the event it were deemed to be a compulsory counterclaim. In the counterclaim itself, St. Paul stated that it was being filed subject to and without waiver of its right to arbitration.

Other than the mere defensive filing of the counterclaim, St. Paul took no action whatsoever to litigate the $20 million claim in superior court. After St. Paul had advanced all funds due under the May 1994 agreement and the full amount of the Barges' liability under such agreement became established, St. Paul sought to amend

its demand for arbitration to include the $20 million claim. In their brief before the trial court, after St. Paul sought to amend its arbitration demand, the Barges themselves acknowledged that "St. Paul has consistently argued that all of the disputes involved in the May, 1994 agreements must be arbitrated." As St. Paul's actions were not inconsistent with its right to arbitrate the $20 million claim, the court erred in finding that St. Paul waived its right to arbitrate such claim.

2. The court's order of June 10, 1996, was broadly worded, ordering the arbitrators "not to hear the new claims asserted in Defendant's Third Amendment to Demand for Arbitration." However, St. Paul's third amendment to its arbitration demand was not limited to adding the $20 million claim. The amendment also requested that the arbitrators grant additional relief with respect to a separate claim already pending before the arbitrators as a result of an earlier amendment.[1] St. Paul appeals the trial court's order to the extent that it purports to bar the arbitrators from considering these additional items of relief not related to the $20 million claim.

We find that the trial court's order was clearly intended to apply only to the $20 million claim, and was not intended to prevent the arbitrators from considering

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[1] In this separate claim, St. Paul sought to recover monies allegedly improperly paid to or for the benefit of the Barges by certain real estate partnerships. In the third amendment, St. Paul asked for interest, attorney fees and arbitration costs with respect to this claim, and for an order requiring the Barges to pay over any such funds received by them after the date of the arbitration award.

the other items of relief requested in the third amendment. Furthermore, if the court intended to preclude the arbitrators from considering such other items, it erred in so doing. These items were merely minor amendments to the relief requested in a separate claim already pending before the arbitrators, and there is no evidence whatsoever in the record that St. Paul waived its right to arbitrate such issues.

Case No. A97A0467

3. The Barges contend the trial court erred in holding that a violation of the ECOA could not be asserted by Ms. Barge as a defense to her liability. The ECOA prohibits creditors from discriminating against applicants for credit on the basis of sex or marital status. 15 USC § 1691. Regulations promulgated thereunder provide that "[e]xcept as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 CFR § 202.7(d)(1). The Barges contend that St. Paul violated the ECOA by requiring Ms. Barge to be a party to the indemnity agreement and May 1994 agreement, although she had no interest in BWI.

However, this court has expressly held that "[a]n alleged violation of 15 USC § 1691 et seq. and 12 CFR 202.7(d)(1) cannot be asserted as an affirmative defense to void a guaranty, but only as a compulsory counterclaim." *Rodgers v. First Union Nat. Bank,* 220 Ga. App. 821, 822(1)(a) (470 SE2d 246) (1996). At the time the court

issued its order, Ms. Barge had not asserted a claim against St. Paul for violation of the ECOA, but merely sought a declaration that her obligations under the indemnity agreement and May 1994 agreement were unenforceable. The trial court did not err in holding that any alleged violation of the ECOA was not a defense to Ms. Barge's liability, and that she was thus compelled to arbitrate her disputes.

4. The issue of an alleged ECOA violation was before the trial court only in connection with the Barges' motion to stay the tax refund arbitration proceedings and St. Paul's motion to stay the superior court proceedings pending arbitration. The Barges had argued that, if the May 1994 agreement was unenforceable against Ms. Barge, then she could not be compelled to arbitration because she would not be party to a binding agreement to arbitrate. Therefore, the court had to consider the ECOA defense in order to rule on the arbitration motions. As we have affirmed the court's holding that Ms. Barge is obligated under the agreement notwithstanding any alleged ECOA violation, and is thus subject to arbitration, it is unnecessary for us to review the court's alternative finding that St. Paul did not in fact violate the ECOA.[2]

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[2] Although not discussed by the parties in their appellate briefs, we note that, following the trial court's order, the Barges amended their complaint to add a claim for damages against St. Paul for violation of the ECOA. As the issue has not been raised by the parties on appeal, we do not express any opinion as to the possible preclusive effect on such claim of the trial court's finding that St. Paul did not violate the ECOA. However, it does not appear that the trial court intended such finding to be a final adjudication of the issue or a partial grant of summary

5. The Barges' contention that the court erred in finding that the tax refund dispute was subject to arbitration is without merit. The May 1994 agreement expressly provides that "[a]ny and all disputes arising out of or in connection with execution or performance of this Agreement, including any breach thereof, shall be resolved through Arbitration." Paragraph 3(B) of the agreement states that the Barges assign all of their right, title and interest in the tax refunds to St. Paul, and requires that all such funds be paid to St. Paul. Disputes over the performance of this provision are clearly subject to arbitration.

The Barges' argument that the arbitration provision violates Georgia public policy because it is too broad is without merit. Each of the cases cited by the Barges was decided prior to the adoption of the Georgia Arbitration Code, OCGA § 9-9-1 et seq., which established a clear public policy in favor of arbitration. See OCGA § 9-9-3 ("a provision in a written contract to submit any controversy thereafter arising to arbitration is enforceable").

Judgment reversed in Case No. A97A0466; judgment affirmed in Case No. A97A0467. Pope, P. J., and Johnson, J., concur.

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judgment to St. Paul on the Barges' declaratory judgment action. If that had been the case, the trial court presumably would not have dismissed the Barges' notice of direct appeal. Rather, it appears the court made the finding merely as an alternative ground for its ruling that the parties' disputes were subject to arbitration.

APPENDIX C

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE, Plaintiffs, v. ST. PAUL FIRE AND MARINE INSURANCE CO. and ALVIN BARGE, Defendants.	CIVIL ACTION FILE NO. E-35589
ST PAUL FIRE AND MARINE INSURANCE CO., Plaintiff in Counterclaim, v. JOHN M. BARGE and OLIVIA L. BARGE, Defendants in Counterclaim.	

ORDER

(Filed Sept. 8, 1995)

The Court has considered Defendant St. Paul's Motion to Stay Proceedings Pending Arbitration and Plaintiffs' Request to Stay Arbitration. In addition, all parties have requested that before the Court determines whether arbitration is the proper forum for the dispute between the parties, the Court should decide whether the General Indemnity Agreement signed November 23, 1993

or the May 18, 1994 Agreement violated the Equal Credit Opportunity Act ("ECOA"), codified at 15 U.S.C. § 1691 et seq. After thorough consideration of the above-styled case, the Court finds as follows:

1.

In their Complaint and Amendment to Complaint, Plaintiffs seek, in Counts II and IV, declaratory judgments that, first, "any security interest or lien purportedly granted by Olivia L. Barge on her interest in the tax refunds pursuant to the Pledge Agreement is void as a matter of law as violating the [ECOA]," Plaintiffs' Complaint at ¶ 13, and, second, Defendant St. Paul "is not entitled to enforce any of the provisions of the General Agreement of Indemnity or the Agreement dated May 18, 1994 against [Olivia L. Barge]." Plaintiffs' Amendment to Complaint at 3. Essentially, then, Plaintiffs are seeking to void the agreements, at least with respect to Olivia L. Barge.

Defendant St. Paul contends that a violation of the ECOA cannot be raised defensively and cannot be used to void an agreement. St. Paul cites several federal cases which, as a whole, do indeed support its contention, though none come from federal courts in Georgia. *See J.L. Diamond v. Union Bank and Trust of Bartlesville,* 776 F.Supp. 542 (N.D.Okl. 1991); *CMF Virginia Land v. Brinson,* 806 F.Supp. 90 (E.D.Va. 1992); *Riggs National Bank of Washington, D.C. v. Linch,* 829 F.Supp. 163 (E.D.Va. 1993), *aff'd* 36 F.3d 370 (4th Cir., 1994); *F.D.I.C. v. Edwardsville, Inc.,* 873 F.Supp. 1474 (D.C.Kan. 1995); *United States v. Joseph Hirsch Sportswear, Co., Inc.,* 1989 WL 20604, 1 (E.D.N.Y. 1989).

In response, Plaintiffs cite *Integra Bank/Pittsburgh v. Freeman*, 839 F.Supp. 326 (E.D.Pa. 1993) in support of its argument that an ECOA violation can be asserted defensively to eliminate Olivia Barge's liability under the agreements. *See also Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3rd Cir. 1995).

However, no party has cited the Court to any authority, and the Court can find none, which is binding on the Court with respect to this issue. Therefore, the Court, while giving thorough consideration to and cognizant of the authority cited by the parties, will determine this issue on a first impression basis.

After thorough consideration, the Court finds that an ECOA violation cannot be asserted defensively. The Court is aware that 15 U.S.C. § 1691e(c) provides that

> Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this title.

However, the statutory scheme does not provide, either directly or indirectly, for the invalidation of a debt under an agreement as a remedy for an ECOA violation. Additionally, the weight of the authority is, as noted above, not to allow an ECOA claim to be asserted defensively.

2.

In addition, the Court finds that there was no ECOA violation with respect to either of the disputed agreements. The difficulty here is in applying the facts of this

case to the statutory authority and case law. 12 CRF § 202.7(d)(1) provides that

> Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

Therefore, a creditor may require the signature of an applicant's spouse if the creditor determines the applicant is not creditworthy otherwise. In his affidavit, Virgil Dolph, Resident Vice President in Atlanta, Georgia of a subsidiary of Defendant St. Paul, states as follows:

> Prior to the execution of the November 26, 1993 General Agreement of Indemnity, St. Paul held the General Agreement of Indemnity dated March 25, 1985 executed by Barge-Wagener, Inc. and the Indemnity Agreements – Third Party Indemniter dated June 2, 1986 executed by John M. Barge and John H. Wagener. The principal reason for obtaining a new General Agreement of Indemnity in the Fall of 1993 was to obtain the personal indemnity of Olivia L. Barge as a condition of granting any further suretyship on behalf of BWI, because St. Paul had determined that BWI, its affiliates, John M. barge and John H. Wagener were no long sufficiently creditworthy without Olivia L. barge's indemnity.

Dolph aff. at ¶ 3. Additionally, Robert A. Wheeler, the senior Authorized Representative for St. Paul in the negotiations with BWI and the indemnitors, states by affidavit that

> St. Paul would not have entered into the May 18, 1994 Agreement and provided funding to BWI if Olivia L. Barge had refused to sign the Agreement and the documents executed by her in connection therewith, because St. Paul did not view BWI, its affiliates, John M. Barge and John H. Wagener sufficiently creditworthy in the absence of her execution.

This evidence has not been rebutted by any direct evidence that John M. Barge was creditworthy under St. Paul's standards. Additionally, the Court does not find the above statements to be contradictory to other statements cited by Plaintiffs made in St. Paul's affidavits and briefs.

Plaintiffs have referred to the fact that St. Paul never requested any financial information from Olivia L. Barge as an important factor in determining whether there has been an ECOA violation. However, in the cases cited by Plaintiffs in support of this proposition, there was evidence either that the applicants in question had already qualified as creditworthy or that no effort had been made to determine whether the applicants were creditworthy by themselves. *See Integra Bank/Pittsburgh v. Freeman*, 839 F.Supp. 326 (E.D.Pa. 1993); *American Security Bank v. York*, 1992 WL 237375, 2 (D.D.C. 1992). This case is distinguishable in that, as stated above, the evidence shows that St. Paul did not find John M. Barge creditworthy without Olivia L. Barge's indemnity. Plaintiffs have not cited the Court to any case, and the Court can find none, in which an ECOA violation was upheld where, as here, the creditor had determined that the applicant was not creditworthy by himself and then required the signature of the applicant's spouse. Indeed, under 12 CFR § 202.7(d)(1), a

violation can only occur "if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." The Court can find no support for the proposition that, if the creditor determines that the applicant does not qualify, the creditor must then request a certain amount of financial information from the applicant's spouse before requiring the spouse's signature.

Additionally, while St. Paul may not have officially requested financial information from Olivia L. Barge, there were negotiations between the parties about which of Mrs. barge's assets would be excluded from her indemnity. Dolph Aff. at ¶ 5. Indeed, Plaintiffs concede that some of Mrs. Barge's assets were specifically excluded from the General Indemnity Agreement. Plaintiff's Supplemental Brief in Support of Request to Stay Arbitration, at 7.

3.

Finally, Plaintiffs contend that arbitration cannot be compelled under the May 18, 1994 agreement. Plaintiffs' first argument is that Georgia arbitration law governs due to the Georgia choice-of-law provision in the contract. Thus, according to Plaintiffs, the arbitration clause in the May 18, 1994 agreement is unenforceable as violative of the public policy of Georgia. *See, e.g., CCC Builders v. City of Augusta,* 237 Ga. 589 (1976). However, even if Georgia arbitration law did apply, the arbitration clause would not necessarily be unenforceable as all of the authority cited by Plaintiffs preceded the current Georgia Arbitration Code, O.C.G.A. § 9-9-1, et seq.

It is undisputed that the agreements in question both involve interstate commerce to the extent that, absent a choice-of-law provision, the arbitration clause would be governed by the Federal Arbitration Act ("FAA"). The contracts, however, do contain Georgia choice-of-law provisions, therefore it becomes the Court's duty to determine whether the arbitration agreements signed by the parties are covered by the FAA or Georgia arbitration law.

Plaintiff has asserted that *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468 (1989), controls this case and mandates that Georgia law govern the issue of arbitration as agreed to by the parties in the choice-of-law provisions in the May 18, 1994 agreement. However, *Volt* does not mandate the use of state arbitration law anytime an arbitration clause and a choice-of-law provision are included in the same document. In *Volt*, the United States Supreme Court merely affirmed the California court's construction of its own state's law, in which the California court found that the parties intended California arbitration law to apply to the agreement in question.

In deciding which arbitration law governs in the instant case, it is important to begin by looking at the purpose of the FAA. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), requires that questions of arbitrability be addressed with a healthy regard for the federal policy favoring arbitration, but additionally *Volt* permits the enforcement of agreements to arbitrate under different rules than those set forth in the FAA itself. *Volt*, 489 U.S. at 479. Thus, the fact that the contracts here involve interstate commerce does not automatically preclude the application of Georgia arbitration

law. Similarly, however, the fact that the contracts here have a Georgia choice-of-law provision does not automatically preclude the application of federal arbitration law.

In a case such as this one, the presence of both an agreement to arbitrate and a choice-of-law provision creates an ambiguity as to whether the agreements to arbitrate are governed by the FAA or Georgia arbitration law. Courts interpreting such provisions in agreements covered by the FAA must give due regard "to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt*, 489 U.S. at 476. Furthermore, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S.Ct. 1212, 1218 (1995) (quoting *Moses H. Cone*, 460 U.S. at 24-25).

In *Mastrobuono*, the Supreme Court was faced with an arbitration provision and a New York choice-of-law provision. An ambiguity in the contract thus existed, as New York law permits only courts to award punitive damages, while federal law permits arbitrators to do so. After first noting that the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties, the Court looked to see what the contract itself had to say about the arbitrability of the claim for punitive damages. Finding that neither the choice-of-law provision nor the arbitration clause expressly precluded an award of punitive damages, the Court concluded that "the best way to harmonize the choice-of-law provision with the

arbitration provision is to read [the choice-of-law provision] to encompass substantive principles that New York courts would apply but not to include special rules limiting the authority of arbitrators." *Mastrobuono*, 115 S.C. at 1219. Similarly, in this case neither the choice-of-law provision nor the arbitration clause evidences an intent to use Georgia arbitration law regarding waiver of the right to arbitrate or the enforceability of arbitration clauses.

This Court finds persuasive the reasoning of the *Mastrobuono* Court and finds that federal arbitration law governs the arbitration provisions in the contracts here while the Georgia choice-of-law provision govern [sic] substantive principles which Georgia courts and the arbitrators would apply. Waiver and the enforceability of arbitration clauses are clearly matters concerning the arbitrability of Plaintiff's claims and are not governed by Georgia law.

The federal policy favoring arbitration signifies an intention to ensure that a waiver of a party's right to arbitrate not be taken lightly. *See Moses H. Cone*, 460 U.S. at 24-25. However, it is possible for a party to waive its right to arbitration by its conduct. *S&H Contractors v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990). The 11th Circuit has found that

> [a] party has waived its right to arbitrate if, "under the totality of the circumstances, the . . . party has acted inconsistently with the arbitration right," and in so acting has in some way prejudiced the other party.

Id. at 1514 (citations omitted). That court went on to hold that in determining whether the other party has been prejudiced, courts may consider the length of delay in

demanding arbitration and the cost to the other party of engaging in the litigation process. *Id.* In *S&H Contractors*, however, the party seeking to compel arbitration had filed suit and then waited eight (8) months before demanding arbitration. *Id.* Here, Defendant St. Paul filed its demand for arbitration before any litigation ensued. By filing a counterclaim, St. Paul was protecting its rights, not acting inconsistently with its right to arbitration. The alleged high cost to Plaintiffs of engaging in the litigation process is due in large part to their own decision to seek their remedy in a court of law, rather than in arbitration. Therefore, under the *S&H Contractors* standard, St. Paul has not waived its right to arbitrate. *See also Moses H. Cone*, 460 U.S. at 24-25 ("as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver . . . ").

Additionally, as noted above in the language culled from *Moses H. Cone* and *Volt*, federal law favors arbitration. Therefore, the arbitration clause at issue in the instant case is clearly enforceable despite its all encompassing nature.

Plaintiffs contend that the May 18, 1994 Agreement did not convey any interest in the tax refunds to St. Paul; instead, it merely contemplated the execution of a future agreement to convey that interest. While the Collateral Agreement does convey an interest in the tax refunds to St. Paul, it does not contain an arbitration clause.

St. Paul responds first by stating that the May 18, 1994 Agreement does indeed convey an interest in the tax

refunds to St. Paul. In fact, paragraph 3(B) of the May 18, 1994 agreement assigns to St. Paul "all of [the Barges and Wagener's] right, title and interest in and to [the specified] federal and state tax refunds due or to become due."

Second, St. Paul contends the Collateral Agreement is part and parcel of the May 18, 1994 Agreement and cites paragraphs 3(A) and 21 of the May 18, 1994 Agreement in support thereof. Paragraph 21 states, in pertinent part, "this Agreement including . . . all documents executed in connection herewith by one or more parties hereto, and all documents and agreements referenced in the aforesaid Agreement . . . shall constitute the entire agreement between the parties hereto. . . . "

Finally, St. Paul points to the arbitration clause in the May 18, 1994 Agreement, located at paragraph 18, which covers "any and all disputes arising out of or in connection with execution or performance of this Agreement, including any breach thereof."

The Court finds the May 18, 1994 Agreement and the Collateral Agreement to be so intertwined that arbitration is the proper forum to resolve any disputes arising out of either Agreement. While Plaintiffs claim they are not in breach of the Collateral Agreement, that claim is properly raised, if at all, before the arbitrators.

Finally, Plaintiffs contend that the May 18, 1994 Agreement and the Collateral Agreement are unenforceable for lack of consideration. Again, that contention is properly raised, if at all, before the arbitrators.

SO ORDERED this 8th day of September, 1995.

/s/ Elizabeth E. Long
Elizabeth E. Long, Judge
Superior Court of
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APPENDIX D

Court of Appeals

of the State of Georgia

ATLANTA, MARCH 12, 1997

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A97A0467

JOHN M. BARGE ET AL V. ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta **MAR 12 1997**

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ William L. Martin *Clerk.*

APPENDIX E

Statutes and Regulations

15 U.S.C. §§ 1691-1691f (1982 & Supp. I 1997)

§ 1691. Scope of prohibition

Activities constituting discrimination

(a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction –

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

Activities not constituting discrimination

(b) It shall not constitute discrimination for purposes of this subchapter for a creditor –

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;

(2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the

amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided in regulations of the Board;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Board, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value; or

(4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant.

Additional activities not constituting discrimination

(c) It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to –

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

(3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Board;

if such refusal is required by or made pursuant to such program.

Reason for adverse action; procedure applicable; definition

(d)(1) Within thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by –

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made

directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calender year preceding the calender year in which the adverse action is taken, as determined under regulations of the Board.

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

(e) Appraisals; copies of reports to applicants; costs

Each creditor shall promptly furnish an applicant, upon written request by the applicant made within a reasonable period of time of the application, a copy of the appraisal report used in connection with the applicant's application for a loan that is or would have been secured by a lien on residential real property. The creditor may require the applicant to reimburse the creditor for the cost of the appraisal.

§ 1691a. Definitions; rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

(c) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(d) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

(e) The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

(f) The term "person" means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(g) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Board under this subchapter or the provision thereof in question.

§ 1691b. Promulgation of regulations by Board; establishment of Consumer Advisory Council by Board; duties, membership, etc., of Council

(a) Regulations

(1) The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

(2) Such regulations may exempt from the provisions of this subchapter any class of transactions that are not primarily for personal, family, or household purposes, or business or commercial loans made available by a financial institution, except that a particular type within a class of such transactions may be exempted if the Board determines, after making an express finding that the application of this subchapter or of any provision of this subchapter of such transaction would not contribute substantially to effecting the purposes of this subchapter.

(3) An exemption granted pursuant to paragraph (2) shall be for no longer than five years and shall be extended only if the Board makes a subsequent determination, in the manner described by such paragraph; that such exemption remains appropriate.

(4) Pursuant to Board regulations, entities making business or commercial loans shall maintain such records

or other data relating to such loans as may be necessary to evidence compliance with this subsection or enforce any action pursuant to the authority of this chapter. In no event shall such records or data be maintained for a period for less than one year. The Board shall promulgate regulations to implement this paragraph in the manner prescribed by chapter 5 of Title 5.

(5) The Board shall provide in regulations that an applicant for a business or commercial loan shall be provided a written notice of such applicant's right to receive a written statement of the reasons for the denial of such loan.

(b) Consumer Advisory Council

The Board shall establish a Consumer Advisory Council to advise and consult with it in the exercise of its functions under this chapter and to advise and consult with it concerning other consumer related matters it may place before the Council. In appointing the members of the Council, the Board shall seek to achieve a fair representation of the interests of creditors and consumers. The Council shall meet from time to time at the call of the Board. Members of the Council who are not regular full-time employees of the United States shall, while attending meetings of such Council, be entitled to receive compensation at a rate fixed by the Board, but not exceeding $100 per day, including travel time. Such members may be allowed travel expenses, including transportation and subsistence, while away from their homes or regular place of business.

§ 1691c. Administrative enforcement

(a) Enforcing agencies

Compliance with the requirements imposed under this subchapter shall be enforced under:

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818], in the case of –

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal Branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act [12 U.S.C.A. §§ 601 et seq., 611 et seq.], by the Board; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) Section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation.

(3) The Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal Credit Union.

(4) Subtitle IV of Title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board.

(5) The Federal Aviation Act of 1958, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that Act.

(6) The Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

(7) The Farm Credit Act of 1971, by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, and production credit association;

(8) The Securities Exchange Act of 1934, by the Securities and Exchange Commission with respect to brokers and dealers; and

(9) The Small Business Investment Act of 1958, by the Small Business Administration, with respect to small business investment companies.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1818(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

Violations of subchapter deemed violations of preexisting statutory requirements; additional agency powers

(b) For the purpose of the exercise by any agency referred to in subsection (a) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (a) of this section, each of the agencies referred to in that subsection may exercise for the purpose of enforcing compliance with any requirement imposed under this subchapter, any other authority conferred on it by law. The exercise of the authorities of any of the agencies referred to in subsection (a) of this section for the purpose of enforcing compliance with any requirement imposed under this subchapter shall in no way preclude the exercise of such authorities for the purpose of enforcing compliance with any other provision of law not relating to the prohibition of discrimination on the basis of sex or marital status with respect to any aspect of a credit transaction.

Overall enforcement authority of Federal Trade Commission

(c) Except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other Government agency under subsection (a) of this section, the Federal Trade Commission shall enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of

its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional test in the Federal Trade Commission Act, including the power to enforce any Federal Reserve Board regulation promulgated under this subchapter in the same manner as if the regulation had been a violation of a Federal Trade Commission trade regulation rule.

Rules and regulations by enforcing agencies

(d) The authority of the Board to issue regulations under this subchapter does not impair the authority of any other agency designated in this section to make rules respecting its own procedures in enforcing compliance with requirements imposed under this subchapter.

§ 1691c-1. Incentives for self-testing and self-correction

(a) Privileged information

(1) Conditions for privilege

A report or result of a self-test (as that term is defined by regulations of the Board) shall be considered to be privileged under paragraph (2) if a creditor –

(A) conducts, or authorizes an independent third party to conduct, a self-test of any aspect of a credit transaction by a creditor, in order to determine the level or effectiveness of compliance with this subchapter by the creditor; and

(B) has identified any possible violation of this subchapter by the creditor and has taken, or is taking, appropriate corrective action to address any such possible violation.

(2) Privileged self-test

If a creditor meets the conditions specified in subparagraphs (A) and (B) of paragraph (1) with respect to a self-test described in that paragraph, any report or results of that self-test –

(A) shall be privileged; and

(B) may not be obtained or used by any applicant, department, or agency in any –

(i) proceeding or civil action in which one or more violations or this subchapter are alleged; or

(ii) examination or investigation relating to compliance with this subchapter.

(b) Results of self-testing

(1) In general

No provision of this section may be construed to prevent an applicant, department, or

agency from obtaining or using a report or results of any self-test in any proceeding or civil action in which a violation of this subchapter is alleged, or in any examination or investigation of compliance with this subchapter if –

(A) the creditor or any person with lawful access to the report or results –

(i) voluntarily releases or discloses all, or any part, of the report or results to the applicant, department, or agency, or to the general public; or

(ii) refers to or describes the report or results as a defense to charges of violations of this subchapter against the creditor to whom the self-test relates; or

(B) the report or results are sought in conjunction with an adjudication or admission of a violation of this subchapter for the sole purpose of determining an appropriate penalty or remedy.

(2) Disclosure for determination of penalty or remedy

Any report or results of a self-test that are disclosed for the purpose specified in paragraph (1)(B) –

(A) shall be used only for the particular proceeding in which the adjudication or admission referred to in paragraph (1)(B) is made; and

(B) may not be used in any other action or proceeding.

(c) Adjudication

An applicant, department, or agency that challenges a privilege asserted under this section may seek a determination of the existence and application of that privilege in –

(1) a court of competent jurisdiction; or

(2) an administrative law proceeding with appropriate jurisdiction.

§ 1691d. Applicability of other laws

Requests for signature of husband and wife for creation of valid lien, etc.

(a) A request for the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title, waiving inchoate rights to property, or assigning earnings, shall not constitute discrimination under this subchapter: *Provided, however,* That this provision shall not be construed to permit a creditor to take sex or marital status into account in connection with the evaluation of creditworthiness of any applicant.

State property laws affecting creditworthiness

(b) Consideration or application of State property laws directly or indirectly affecting creditworthiness shall not constitute discrimination for purposes of this subchapter.

State laws prohibiting separate extension of consumer credit to husband and wife

(c) Any provision of State law which prohibits the separate extension of consumer credit to each party to a marriage shall not apply in any case where each party to a marriage voluntarily applies for separate credit from the same creditor: *Provided,* That in any case where such a State law is so preempted, each party to the marriage shall be solely reponsible [sic] for the debt so contracted.

Combining credit accounts of husband and wife with same creditor to determine permissible finance charges or loan ceilings under Federal or State laws

(d) When each party to a marriage separately and voluntarily applies for and obtains separate credit accounts with the same creditor, those accounts shall not be aggregated or otherwise combined for purposes of determining permissible finance charges or permissible loan ceilings under the laws of any State or of the United States.

Election of remedies under subchapter or State law; nature of relief determining applicability

(e) Where the same act or omission constitutes a violation of this subchapter and of applicable State law, a person aggrieved by such conduct may bring a legal action to recover monetary damages either under this subchapter or under such State law, but not both. This election of remedies shall not apply to court actions in which the relief sought does not include monetary damages or to administrative actions.

Compliance with inconsistent State laws; determination of inconsistency

(f) This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this subchapter if the Board determines that such law gives greater protection to the applicant.

Exemption by regulation of credit transactions covered by State law; failure to comply with State law

(g) The Board shall by regulation exempt from the requirements of sections 1691 and 1691a of this title any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this subchapter or that such law gives greater protection to the applicant, and that there is adequate provision for enforcement. Failure to comply with any requirement of such State law in any transaction so exempted shall constitute a violation of this subchapter for the purposes of section 1691e of this title.

§ 1691e. Civil liability

Individual or class action for actual damages

(a) Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

Recovery of punitive damages in individual and class actions for actual damages; exemptions; maximum amount of punitive damages in individual actions; limitation on total recovery in class actions; factors determining amount of award

(b) Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

Action for equitable and declaratory relief

(c) Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter.

Recovery of costs and attorney fees

(d) In the case of any successful action under subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

Good faith compliance with rule, regulation, or interpretation of Board or interpretation or approval by an official or employee of Federal Reserve System duly authorized by Board

(e) No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Jurisdiction of courts; time for maintenance of action; exceptions

(f) Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation, except that –

(1) whenever any agency having responsibility for administrative enforcement under section 1691c of this title commences an enforcement proceeding within two years from the date of the occurrence of the violation,

(2) whenever the Attorney General commences a civil action under this section within two years from the date of the occurrence of the violation,

then any applicant who has been a victim of the discrimination which is the subject of such proceeding or civil action may bring an action under this section not later than one year after the commencement of that proceeding or action.

Request by responsible enforcement agency to Attorney General for civil action

(g) The agencies having responsibility for administrative enforcement under section 1691c of this title, if unable to obtain compliance with section 1691 of this title, are authorized to refer the matter of the Attorney General with a recommendation that an appropriate civil action be instituted. Each agency referred to in paragraphs (1), (2), and (3) of section 1691c(a) of this title shall

refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of section 1691(a) of this title. Each such agency may refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has violated section 1691(a) of this title.

Authority for Attorney General to bring civil action; jurisdiction

(h) When a matter is referred to the Attorney General pursuant to subsection (g) of this section, or whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation of this subchapter, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including actual and punitive damages and injunctive relief.

Recovery under both subchapter and fair housing enforcement provisions prohibited for violation based on same transaction

(i) No person aggrieved by a violation of this subchapter and by a violation of section 3605 of Title 42 shall recover under this subchapter and section 3612 of Title 42, if such violation is based on the same transaction.

Discovery of creditor's granting standards

(j) Nothing in this subchapter shall be construed to prohibit the discovery of a creditor's credit granting standards under appropriate discovery procedures in the court or agency in which an action or proceeding is brought.

Notice to HUD of violations

(k) Whenever an agency referred to in paragraph (1), (2), or (3) of section 1691c(s) of this title –

> (1) has reason to believe, as a result of receiving a consumer complaint, conducting a consumer compliance examination, or otherwise, that a violation of this subchapter has occurred;
>
> (2) has reason to believe that the alleged violation would be a violation of the Fair Housing Act [42 U.S.C.A. § 3601 et seq.]; and
>
> (3) does not refer the matter to the Attorney General pursuant to subsection (g) of this section,

the agency shall notify the Secretary of Housing and Urban Development of the violation, and shall notify the applicant that the Secretary of Housing and Urban Development has been notified of the alleged violation and that remedies for the violation may be available under the Fair Housing Act (42 U.S.C.A. § 3601 et seq.]

§ 1691f. Annual reports to Congress; contents

Each year, the Board and the Attorney General shall, respectively, make reports to the Congress concerning the administration of their functions under this subchapter, including such recommendations as the Board and the Attorney General, respectively, deem necessary or appropriate. In addition, each report of the Board shall include its assessment of the extent to which compliance with the requirements of this subchapter is being achieved, and a summary of the enforcement actions taken by each of the agencies assigned administrative enforcement responsibilities under section 1691c of this title.

12 C.F.R. § 202.7(d) (1995)

§ 202.7 Rules concerning extensions of credit.

* * *

(d) *Signature of spouse or other person* – (1) *Rule for qualified applicant.* Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

(2) *Unsecured credit.* If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.

(3) *Unsecured credit – community property states.* If a married applicant requests unsecured credit and resides in a community property state, or if the property upon which the applicant is relying is located in such a state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the amount of credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.

(4) *Secured credit.* If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights or assign earnings.

(5) *Additional parties.* If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the extension of the credit requested, a creditor may request a cosigner, guarantor, or the like. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.

(6) *Rights of additional parties.* A creditor shall not impose requirements upon an additional party that the creditor is prohibited from imposing upon an applicant under this section.

* * *

APPENDIX F

SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE, Plaintiffs,	*	CIVIL ACTION NO. E35589
vs.	*	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY and ALVIN BARGE, Defendants.	*	

COMPLAINT FOR DECLARATORY JUDGMENT AND APPLICATION FOR STAY OF ARBITRATION

(Filed Febr. 10, 1995)

COME NOW Plaintiffs and for their complaint show this Court as follows:

1.

Defendant, St. Paul Fire and Marine Insurance Company ("St. Paul") is a Minnesota corporation which is qualified to do business in the State of Georgia and which is a joint obligor with Defendant, Alvin Barge, a resident of Fulton County, Georgia. St. Paul may be served with a summons and complaint by service upon its registered agent for service of process Thomas L. Vehlin, 100 Crescent Center Parkway, Suite 1000, Tucker, Georgia 30084.

2.

Defendant, Alvin Barge, is a resident of Fulton County, Georgia and is subject to jurisdiction and venue of this Court.

3.

On May 18, 1994, Plaintiffs entered into an "Agreement" with St. Paul.

4.

Paragraph 3(b) of the Agreement provides that the Plaintiffs would assign to St. Paul all of their right title and interest in and to any federal and state tax refunds due or to become due for tax years 1995 and earlier and for the tax year 1996 to the extent that they receive payment of any income from Barge-Wagener or any affiliate thereof.

5.

Paragraph 18 of the Agreement provides that any disputes arising out of or in connection with execution or performance of the Agreement, including any breach thereof, would be resolved through arbitration in accordance with the Construction Arbitration Rules of the American Arbitration Association.

6.

As contemplated by the Agreement, on May 18, 1994, Plaintiffs entered into a "Pledge Agreement-Pari Passu"

("Pledge Agreement") by which they granted and conveyed to St. Paul and Alvin Barge a security interest and lien in certain collateral, including, *inter alia*, all of their right, title and interest in and to all federal and state tax refunds due or to become due to Plaintiffs for tax years 1995 and earlier and for the tax year 1996 to the extent that they receive payment of income from Barge-Wagener, Inc. or any affiliate thereof. A copy of the Pledge Agreement is attached hereto as Exhibit "A" and incorporated by reference herein as if set forth in full.

7.

On January 25, 1995, Defendant St. Paul demanded arbitration before the American Arbitration Association alleging a breach of the Pledge Agreement and seeking recovery of all alleged tax refunds which have been received by Plaintiffs. A copy of the demand for arbitration is attached hereto as Exhibit "B" and incorporated by reference herein as if set forth in full.

COUNT I

Demand for Declaratory Judgment

8.

Plaintiffs incorporate by reference herein paragraphs 1-7 of the complaint with the same force and effect as if they had been restated herein.

9.

Plaintiffs show that the Pledge Agreement by which St. Paul makes it demand for the tax refunds does not

contain an arbitration provision and, thus, any disputes arising or relating thereto are not subject to arbitration.

10.

Plaintiffs are entitled to an order in accordance with the O.C.G.A. § 9-4-1 *et seq.* for a declaratory judgment declaring that no valid agreement to submit to arbitration was made by the parties to this action to arbitrate any dispute relating to tax refunds and the Pledge Agreement.

COUNT II

Declaratory Judgement as to Liability of Olivia L. Barge

11.

Plaintiffs incorporate by reference herein paragraph 1-10 of the complaint with the same force and effect as if they had been restated herein.

12.

Plaintiffs are entitled to an order of this Court pursuant to O.C.G.A. § 9-4-1 *et seq.* declaring that Olivia L. Barge owns a one-half interest in the tax refunds which are the subject matter of the Pledge Agreement and St. Paul's demand for arbitration.

13.

Further, Olivia L. Barge is entitled to an order of this Court pursuant to O.C.G.A. § 9-4-1 *et seq.* declaring that

any security interest or lien purportedly granted by Olivia L. Barge on her interest in the tax refunds pursuant to the Pledge Agreement is void as a matter of law as violating the Equal Credit Opportunity Act, 15 U.S.C. 1691.

COUNT III

Application to Stay Arbitration

14.

Plaintiffs incorporate by reference herein paragraphs 1-13 with the same force and effect as if they had been restated herein.

15.

Plaintiffs are entitled to a stay of the arbitration proceedings attempted to be commenced by St. Paul before the American Arbitration Association on the grounds that there exists no valid agreement to submit to arbitration, that the claims asserted by Defendants against Plaintiffs are not subject to arbitration, and that, notwithstanding the absence of an enforceable, valid arbitration agreement, Defendants have failed to give proper notice of the commencement of the attempted arbitration proceeding.

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows:

1. That this Court enter a declaratory judgment holding that St. Paul Fire and Marine Insurance Company

is not entitled to arbitrate any potential or alleged disputes pursuant to the Pledge Agreement with respect to income tax refunds;

2. That Plaintiffs be granted a declaratory judgment holding that with respect to any potential income tax refunds which are the subject matter of the Pledge Agreement, Olivia L. Barge owns a one-half interest in such tax refunds and that such tax refunds are not subject to any purported security interest or lien created by the Pledge Agreement;

3. That all arbitration proceedings be stayed pending the resolution of this action; and

4. That Plaintiffs be granted such other and further relief as this Court deems just and proper.

/s/ John A. Christy
John A. Christy
Georgia Bar No. 125518
David H. Flint
Georgia Bar No. 264600
Attorneys for Plaintiff

SCHREEDER, WHEELER, & FLINT
127 Peachtree Street, N.E.
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Atlanta, Georgia 30303-1845
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EXHIBIT A

PLEDGE AGREEMENT – PARI PASSU

THIS AGREEMENT, made as of the 18th day of May, 1994, by **BARGE-WAGENER, INC., a Georgia corporation ("BWI"), OLIVIA L. BARGE, JOHN M. BARGE and JOHN H. WAGENER** (hereinafter collectively called "Grantor") in favor of **ST. PAUL FIRE AND MARINE INSURANCE COMPANY,** a Minnesota corporation (hereinafter called "Collateral Agent") as collateral agent for itself and **ALVIN BARGE,** an individual resident of Atlanta, Georgia:

WITNESSETH THAT:

WHEREAS, the parties constituting Grantor hereunder have obligated themselves to St. Paul Fire and Marine Insurance Company pursuant to a certain Contractor's General Agreement of Indemnity dated November 26, 1993 (the "General Indemnity") and a certain Agreement dated as of May 18, 1994 (the "General Funding Agreement") pursuant to which St. Paul Fire and Marine Insurance Company anticipates making advances to BWI to be evidenced by a certain master promissory note (the "Master Note") and any subsequent additional promissory notes (the "Additional Notes") evidence any additional advances to BWI by St. Paul Fire and Marine Insurance Company. The obligations outstanding from time to time to reimburse funds advanced or expended under the General indemnity, the General Funding Agreement, the Master Note and the Additional Notes, together with interest thereo [sic], are herein referred to as the "St. Paul Indebtedness";

WHEREAS, John H. Wagener and John M. Barge, who are officers, directors and shareholders of BWI, are indebted to Alvin Barge in the principal sum of $400,000 for advances made for the benefit of BWI or other business activities related thereto evidenced by a Promissory Note in the original principal amount of $500,000 dated May 5, 1992 as supplemented by a certain Forbearance Agreement dated May 18, 1994 (the amount of such indebtedness to Alvin Barge outstanding from time to time being referred to herein as the "Barge Indebtedness");

WHEREAS, St. Paul Fire and Marine Insurance Company would not make the advances contemplated by the General Funding Agreement and expenditures under the General Indemnity but for the agreement of Grantor to provide security for repayment of the St. Paul Indebtedness;

WHEREAS, Alvin Barge has agreed to terminate all of his rights under that certain Agreement (the "April 15 Pledge") dated April 15, 1994 made in his favor by John H. Wagener and John M. Barge on the condition that he receive alternate security for the Barge Indebtedness;

WHEREAS, this Pledge Agreement – Pari Passu is being given to secure both the Barge Indebtedness and the St. Paul Indebtedness;

WHEREAS, Grantor and Medallion Capital Group also have executed and delivered a separate Pledge Agreement to secure only the St. Paul Indebtedness (the "St. Paul Pledge");

WHEREAS, St. Paul Fire and Marine Insurance Company and Alvin Barge have agreed under the terms of a certain Intercreditor Agreement (the "Intercreditor Agreement") dated as of May 18, 1994 that certain security for the Barge Indebtedness and the St. Paul Indebtedness shall be held pari passu with no priority of lien or payment over the other and have pursuant to the Intercreditor Agreement appointed Collateral Agent as their agent under this Pledge Agreement – Pari Passu to collect and receive collateral for and payments made with respect to the Barge Indebtedness and the St. Paul Indebtedness;

NOW THEREFORE, in consideration of the premises and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE I

Security Interests

1.1 Grantor hereby (i) collaterally assigns, transfers and conveys to Collateral Agent and (ii) grants to Collateral Agent security interests in and to any and all present and future rights of Grantor in and to all of the property described in Sections I, II and III of Exhibit "D" to the General Funding Agreement (the "Collateral"), a copy of which Exhibit "D" is attached hereto as *Exhibit "One"* and hereby made a part hereof. Grantor acknowledges that it has, pursuant to the St. Paul Pledge which is not subject to the Intercreditor Agreement, granted a security interest for the benefit of St. Paul in the property described in Sections IV through XIII of said Exhibit "D" and that the

Collateral conveyed hereby is in addition to such separate security interest.

1.2 This Agreement is made to secure and enforce the payment of the Barge Indebtedness and the St. Paul Indebtedness, together with any and all renewals and extensions of the same, or any part thereof (hereinafter sometimes referred to as the "secured indebtedness" or the "indebtedness secured hereby"). The General Funding Agreement, the Third Mortgage, the Master Note, the Additional Note, the General Indemnity, the St. Paul Pledge and this Agreement and any additional documents executed in connection therewith are collectively referred to herein as the "Loan Documents".

1.3 The security interest is granted to the Collateral Agent as agent for the holders of the St. Paul Indebtedness and the Barge Indebtedness in accordance with the terms of the Intercreditor Agreement.

ARTICLE II

Proceeds and Distributions

The portion of the Collateral described in Section III of the General Funding Agreement Exhibit "D" (Exhibit "One" hereto) is subject to the conditions stated in Section III of said Exhibit "D" (Exhibit "One" hereto).

ARTICLE III

Remedies in Event of Default

3.1 The term "default" as used in this Agreement shall mean the occurrence of any of the following events:

(a) the failure of Grantor to make due and punctual payment of the secured indebtedness (after any applicable grace period) as the same shall become due and payable, whether at maturity or when accelerated pursuant to any power to accelerate; or

(b) the failure of Grantor timely and properly to observe, keep or perform any covenant, agreement, warranty or condition herein required to be observed, kept or performed, if such failure continues for thirty (30) days after receipt by Grantor of written notice and demand for the performance of such covenant, agreement, warranty or condition (provided, however, that Grantor shall have a reasonable time to cure any non-monetary default which is of its nature not susceptible to cure within thirty (30) days provided that curative action is commenced promptly upon notice and is diligently pursued to completion).

3.2 Upon the occurrence of a default, Collateral Agent shall have the option of declaring all secured indebtedness in its entirety to be immediately due and payable.

3.3 If a default shall have occurred and while the same is continuing, Collateral Agent, in addition to any and all other rights and remedies which Collateral Agent may have hereunder or under the Uniform Commercial Code of the State of Georgia (hereinafter called the "Code"), or otherwise, at its option may: (a) reduce Collateral Agent's claim to judgment, or otherwise enforce the security interest assigned to Collateral Agent hereunder in all or any part of the Collateral by any available judicial procedure; (b) after notification, if any, provided

for herein, sell or otherwise dispose of at the office of Collateral Agent, or elsewhere, as chosen by Collateral Agent, all or any part of the Collateral and any such sale or other disposition may be by public or private proceedings, and by way of one or more contracts (it being agreed that the sale of any part of the Collateral shall not exhaust Collateral Agent's power of sale, but sales may be made from time to time until all of the Collateral has been sold or until the secured indebtedness has been paid in full), and at any such sale it shall not be necessary to exhibit the Collateral; (c) at Collateral Agent's discretion, retain the Collateral in satisfaction of the secured indebtedness, or any part thereof, whenever the circumstances are such that Collateral Agent is entitled to do so under the Code; (d) apply by appropriate judicial proceedings for appointment of a receiver for the Collateral, or any part thereof, and Grantor hereby consents to any such appointment; (e) purchase the Collateral at any public sale; and (f) purchase the Collateral at any private sale if the Collateral is of the type customarily sold in a recognized market or is if a type which is the subject to widely distributed standard price quotations. Collateral Agent shall be entitled to apply the proceeds of any sale or other disposition of the Collateral subject to the terms of the Intercreditor Agreement. Collateral Agent shall account to Grantor for any surplus.

3.4 The requirement of reasonable notice to Grantor of the time and place of any public sale of the Collateral, or of the time after which any private sale or any other intended disposition thereof is to be made, shall be met if such notice is mailed, postage prepaid, to Grantor at the address of Grantor designated with its signature below, at

least ten (10) days before the date of any public sale or at least ten (10) days before the time after which any private sale or other disposition is to be made.

3.5 Collateral Agent may waive any default or remedy any default in any reasonable manner without waiving the default remedied and without waiving any other prior or subsequent default.

3.6 The rights granted hereunder are cumulative of any and all other security now or hereafter held by Collateral Agent or other holder for payment of the indebtedness secured hereby and Collateral Agent may resort to any security now or hereafter existing for the payment of such secured indebtedness in such portions and in such order as may seem best to Collateral Agent in its sole and uncontrolled discretion but subject to the terms of the Intercreditor Agreement. No failure on the part of Collateral Agent to exercise and no delay in exercising any right, power or remedy hereunder shall operate as a waiver thereof nor shall any single or partial exercise by Collateral Agent of any right, power or remedy hereunder preclude any other or further exercise thereof or the exercise of any right, power or remedy.

ARTICLE IV

Miscellaneous

4.1 When all of the indebtedness secured by this Agreement has been paid in full and all obligations and liabilities of the Grantor hereunder shall have been performed and discharged, then, and in that case only, upon Grantor's request and at Grantor's expense, Collateral

Agent shall release the security interest in the Collateral evidenced hereby.

4.2 No modification or waiver of any provision of this Agreement nor consent to any departure by Grantor therefrom shall in any event be effective unless the same shall be in writing and signed by Collateral Agent and then such waiver or consent shall be effective only in the specific instances, for the purposes for which given and to the extent therein specified. No notice to nor demand on Grantor in any case shall of itself entitle Grantor to any other or further notice of demand in similar or other circumstances.

4.3 All notices and other communications provided herein shall be in writing and shall be telecopied, mailed or delivered to the intended recipients at the addresses set forth underneath such party's name on the signature page hereto. Except as otherwise provided in this Agreement, all notices and other communications hereunder shall be deemed to have been duly given when transmitted by telecopier, in each case addressed as aforesaid or personally delivered or, in the case of mailed notice, when actually received by the intended recipient. Telecopied notices shall be promptly confirmed by the sender by letter provided that failure to confirm any such telecopied notice shall not affect its validity.

4.4 The terms and provisions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of Grantor and Collateral Agent.

4.5 The law governing this Agreement shall be that of the State of Georgia.

4.6 Olivia L. Barge is joining in this Agreement solely for the purpose of conveying such interest as she may have in the property described in Section I of the General Funding Agreement Exhibit "D" (Exhibit "One" hereto), and shall have no further obligations under this Agreement. Her liabilities in all events continue to be subject to the limitations stated in Paragraph 22 of the General Indemnity.

IN WITNESS WHEREOF, this Agreement is executed on behalf of Grantor as of the date first above written.

GRANTOR:

/s/ John M. Barge
JOHN M. BARGE

/s/ John H. Wagener
JOHN H. WAGENER

/s/ Olivia L. Barge
OLIVIA L. BARGE

BARGE-WAGENER, INC.

By: /s/ John M. Barge

Title: C.E.O.

Address for Grantor:

1815 The Exchange
Atlanta, Georgia 30339

Address for Collateral Agent:

385 Washington Street
St. Paul, Minnesota 55102

APPENDIX G

SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE, Plaintiffs, vs. ST. PAUL FIRE AND MARINE INSURANCE COMPANY and ALVIN BARGE, Defendants.	*	CIVIL ACTION NO. E-35589 JUDGE LONG (Filed July 13, 1995)

AMENDMENT TO COMPLAINT

COME NOW plaintiffs and hereby amend their complaint in this action by adding an additional count, Count IV, for declaratory relief which shall read as follows:

Count IV

Demand for Declaratory Judgment
With Respect to General Agreement of Indemnity.

16.

Plaintiffs reallege and incorporate by reference herein paragraphs 1-15 of the complaint with the same force and effect as if they had been restated herein.

17.

On or about November 26, 1993, plaintiffs entered into a "General Agreement of Indemnity" with St. Paul.

18.

The General Agreement of Indemnity required plaintiff, Olivia Barge, the wife of the plaintiff, John Barge, to be responsible for the indebtedness of a business, Barge-Wagener, Inc., owned by her husband, despite the fact that both the company and the other parties to the General Agreement of Indemnity, John barge and John Wagener, were otherwise qualified from the standards of credit worthiness for the amount and terms of the credit being extended by the defendant, St. Paul and Olivia Barge was not an officer or director of Barge Wagener Inc. and was not involved in its operations.

19.

By virtue of the foregoing, the General Agreement of Indemnity violates the provisions of the Equal Credit Opportunity Act, 15 U.S.C. § 1791 and is therefore unenforceable with respect to Olivia Barge.

20.

In May, 1994 St. Paul demanded that Olivia Barge execute an "Agreement" which was essentially a reaffirmation and continuation of the General Agreement of Indemnity by which St. Paul demanded that she pledge additional property for the debts of her husband John Barge and his company, Barge Wagener, Inc., although

Olivia Barge was not an officer or director of Barge Wagener Inc. and was not involved in its operations.

21.

By virtue of the foregoing, the Agreement dated May 18, 1994 violates the provisions of the Equal Credit Opportunity Act, 15 U.S.C. § 1791 and is therefore unenforceable with respect to Olivia Barge.

WHEREFORE, plaintiff, Olivia Barge, requests this Court to enter a declaratory judgment on Count IV of this complaint holding that St. Paul Fire Marine Insurance Company is not entitled to enforce any of the provisions of the General Agreement of Indemnity or the Agreement dated May 18, 1994 against her.

/s/ David H. Flint
David H. Flint
Georgia Bar No. 264600
John A. Christy
Georgia Bar No. 125518
Attorney for Plaintiffs

SCHREEDER, WHEELER, & FLINT
127 Peachtree Street, N.E.
16th Floor, The Candler Building
Atlanta, Georgia 30303-1845
(404) 681-3450

CERTIFICATE OF SERVICE

This is to certify that the foregoing **AMENDMENT TO COMPLAINT** was served on the following by depositing same in the United States First-Class Mail with sufficient postage affixed thereon to ensure delivery addressed as follows:

Edward Wasson, Esq.
Wasson, Sours & Harris
300 Galleria Parkway, N.W.
Suite 1000
Atlanta, GA 30339

Dean Booth, Esq.
BOOTH, WADE & CAMBELL
3100 Cumberland Circle
Suite 1500
Atlanta, Georgia 30339

This the 13 day of July, 1995.

/s/ John A. Christy
John A. Christy
Georgia Bar No. 125518
Attorney for Plaintiff

SCHREEDER, WHEELER, & FLINT
127 Peachtree Street, N.E.
16th Floor, The Candler Building
Atlanta, Georgia 30303-1845
(404) 681-3450

APPENDIX H

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE, Plaintiffs, vs. ST. PAUL FIRE AND MARINE INSURANCE COMPANY and ALVIN BARGE, Defendants, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiff-in-Counterclaim, vs. JOHN M. BARGE and OLIVIA L. BARGE, Defendants in Counterclaim.	Civil Action No. E-35589 Judge Long (Filed June 19, 1996)

CERTIFICATE OF IMMEDIATE REVIEW

This Court having entered an Order in this case dated June 10, 1996 granting Plaintiffs' Renewed Motion to Stay Arbitration regarding the $20 million claim of Defendant St. Paul Fire and Marine Insurance Company against Plaintiffs and ordering that the arbitrators impaneled in this case not hear the new claims asserted in Defendant's Third Amendment to Demand for Arbitration, and it appearing that this Order is not subject to direct appeal, I do hereby certify in accordance with

O.C.G.A. § 5-6-34(b) that such Order is of such importance that immediate review should be had by the Court of Appeals of Georgia.

SO ORDERED this 19th day of June, 1996.

/s/ Elizabeth E. Long
Elizabeth E. Long, Judge
Superior Court of
Fulton County
Atlanta Judicial Circuit

APPENDIX I

SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE, Plaintiffs, vs. ST. PAUL FIRE AND MARINE INSURANCE COMPANY and ALVIN BARGE, Defendants.	*	CIVIL ACTION NO. E-35589 JUDGE LONG

PLAINTIFFS' NOTICE OF APPEAL AND CROSS-APPEAL

(Filed July 26, 1996)

Notice is hereby given that plaintiffs, John M. Barge and Olivia L. Barge, plaintiffs in the above-captioned lawsuit, and pursuant to the Certificate of Immediate Review entered by Judge Elizabeth Long on June 19, 1996 and pursuant to the order of the Court of Appeals of the State of Georgia (attached as Exhibit "A" hereto), granting St. Paul Fire and Marine Insurance Company's Application for Interlocutory Appeal, hereby file their cross-appeal to the Court of Appeals from the Order granting plaintiffs' revised Motion for Stay of Arbitration, entered in this action on June 10, 1996, and their appeal from the "Order" entered by this Court on September 8, 1995, denying the plaintiffs' motion to stay arbitration based on

violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*

The clerk shall omit nothing from the record on appeal and shall include a copy of the attached order of the Court of Appeals.

No transcript of evidence of proceedings will be filed for inclusion in the record on appeal.

The Court of appeals, rather than the Supreme Court, has jurisdiction of this case for the reason that this case is not one for which exclusive jurisdiction has been conferred on the Supreme Court by the Constitution of the State of Georgia, Art. VI, § VI, ¶¶ II, III of the Constitution of the State of Georgia.

This the 25th day of July, 1996.

/s/ John A. Christy
JOHN A. CHRISTY
Attorney for Plaintiffs
Georgia Bar No. 125518

SCHREEDER, WHEELER, & FLINT
1600 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845
(404) 681-3450

EXHIBIT A

Court of Appeals

of the State of Georgia

ATLANTA, JULY 16, 1996

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

APPLICATION NO. A96I0360

ST. PAUL FIRE ET AL V. JOHN M. BARGE ET AL

Upon consideration of the Application for an Interlocutory Appeal, it is ordered that it be hereby GRANTED. The Appellant may file a Notice of Appeal within 10 days of the date of this order. The Clerk of SUPERIOR COURT is directed to include a copy of this order in the record transmitted to the Court of Appeals.

98040

E35589

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUL 16 1996

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

CERTIFICATE OF SERVICE

This is to certify that I have on this day served opposing counsel in the foregoing matter with a copy of **Plaintiffs' Notice of Appeal and Cross-Appeal** by depositing a copy of same in the United States First Class Mail in a properly addressed envelope with adequate postage affixed thereon addressed to:

Edward H. Wasson, Jr., Esq.
W. Hensell Harris, Jr., Esq.
Wasson, Sours & Harris, P.C.
300 Galleria Parkway, N.W.
Suite 1000
Atlanta, Georgia 30339

Ms. Sharon Scribner
Tribunal Administrator
American Arbitration Association
1975 Century Boulevard, N.E.
Suite 1
Atlanta, Georgia 30345-3203

This the 26 day of July, 1996.

/s/ John A. Christy
JOHN A. CHRISTY
Attorney for Plaintiffs
Georgia Bar No. 125518

SCHREEDER, WHEELER, & FLINT
1600 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845
(404) 681-3450

APPENDIX J

SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE,	*	
Plaintiffs,	*	CIVIL ACTION
vs.	*	NO. E-35589
ST. PAUL FIRE AND MARINE INSURANCE COMPANY and ALVIN BARGE,	*	JUDGE LONG
Defendants.	*	

AFFIDAVIT OF OLIVIA BARGE

Personally appeared before the undersigned officer duly authorized to administer oaths, Olivia Barge, who, after having been sworn does hereby depose and state under oath follows:

1.

My name is Olivia L. Barge. I am a plaintiff in this action. This affidavit is being made upon my personal knowledge.

2.

In November, 1993, St. Paul Fire and Marine Insurance Company requested that I sign a General Agreement of Indemnity. At that time, I was not asked to submit a personal financial statement. I did not speak with nor

was I contacted by anyone representing St. Paul Fire Marine Insurance Company requesting any information about my financial condition. I am not aware of any credit investigation being made by St. Paul or on behalf of St. Paul with respect to my executing the General Agreement of Indemnity.

I make claim to a one-half interest in the tax refund which is the subject matter of this action. That one-half interest represents my property and is not property which is being transferred to me by John Barge and is therefore excludible [sic] under the provisions of the General Agreement of Indemnity and the May 18, 1994 Agreement, assuming they are enforceable against me.

4.

I am not now nor have I have been a shareholder, officer or director of Barge Wagener, Inc. I have never participated in the business affairs of Barge Wagener, Inc.

This the 31st day of August, 1995.

/s/ Olivia L. Barge
OLIVIA L. BARGE

Sworn to and subscribed
before me this 31st day
of August, 1995.

/s/ Jeanie L. Vaughan
NOTARY PUBLIC

Notary Public Barlow County, Georgia
My Commission Expires August 20, 1997

[NOTARIAL SEAL]

CERTIFICATE OF SERVICE

This is to certify that the foregoing **AFFIDAVIT OF OLIVIA BARGE** was served on the following by depositing same in the United States First-Class Mail with sufficient postage affixed thereon to ensure delivery addressed as follows:

Edward Wasson, Esq.
Wasson, Sours & Harris
300 Galleria Parkway, N.W.
Suite 1000
Atlanta, GA 30339

Dean Booth, Esq.
BOOTH, WADE & CAMBELL
3100 Cumberland Circle
Suite 1500
Atlanta, Georgia 30339

This the 6 day of September, 1995.

/s/ John A. Christy
John A. Christy
Georgia Bar No. 125518
Attorney for Plaintiff

SCHREEDER, WHEELER, & FLINT
127 Peachtree Street, N.E.
16th Floor, The Candler Building
Atlanta, Georgia 30303-1845
(404) 681-3450

APPENDIX K

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE,	)	
Plaintiff [sic],	)	CIVIL ACTION
vs.	)	NO. E-35589
ST. PAUL FIRE AND MARINE INSURANCE COMPANY and ALVIN BARGE,	)	
Defendants.	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,	)	
Plaintiff in Counterclaim,	)	
vs.	)	
JOHN M. BARGE and OLIVIA L. BARGE,	)	
Defendants in Counterclaim.	)	

AFFIDAVIT OF ROBERT A. WHEELER IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING ARBITRATION

Personally appeared before the undersigned officer duly authorized to administer oaths, Robert A. Wheeler, who after being first duly sworn, deposed and stated under oath as follows:

1.

Affiant has personal knowledge of the facts hereinafter stated, is over 21 years of age and under no legal

disability, and makes this Affidavit for all purposes permitted by law.

2.

Affiant is an Authorized Representative of St. Paul Fire and Marine Insurance Company, a Minnesota Corporation.

3.

Plaintiffs John M. Barge and Olivia L. Barge are two indemnitors under a general agreement of indemnity dated November 26, 1993 ("Indemnity Agreement"), in favor of St. Paul in reliance on which St. Paul provided construction surety bonds on behalf of Barge-Wagener, Inc., as principal, now known as 1815 Exchange, Inc., of Atlanta, Georgia ("BWI"). A copy of the Indemnity Agreement is attached hereto and made a part hereof as Exhibit "A." In the Spring of 1994, BWI, having severe financial difficulties, sought funding from St. Paul Fire and Marine Insurance Company ("St. Paul") to complete construction projects on which St. Paul had furnished perfomance and payments bonds. BWI, St. Paul and John M. Barge and Olivia L. Barge, and certain other parties, reached an agreement concerning funding which was memorialized in a May 18, 1994 agreement ("Agreement"). A copy of the Agreement, excluding exhibits, is attached hereto and made a part hereof as Exhibit "B."

4.

St. Paul is a Minnesota corporation, and its principal office is in St. Paul, Minnesota John M. Barge and Olivia L. Barge are residents of the State of Georgia. The construction projects which are the subject of the Agreement are located in Foreign states as well as the State of Georgia, and involve subcontractors, suppliers, and employees from foreign states as well as the State of Georgia.

5.

Among other things, the Agreement contains a provision at Paragraph 3(B) which states that John M. Barge and Olivia L. Barge assigned all their right, title, and interest in certain tax refunds to St. Paul and agreed to pay same to St. Paul. John M. Barge and Olivia L. Barge have received certain tax refunds totaling in excess of $300,000.00 and they have failed and refused to pay same to St. Paul.

6.

The Agreement contains an arbitration clause at Paragraph 18 which states that all claims and disputes be resolved through arbitration before the American Arbitration Association.

7.

Pursuant to the aforesaid arbitration clause, St. Paul instituted arbitration proceedings against John M. Barge and Olivia L. Barge before the American Arbitration

Association, in the Atlanta Regional Office on January 25, 1995, AAA No. 30-110-00011-95 ("the Arbitration") to recover said tax refunds and any future tax refunds. A copy of St. Paul's Demand for Arbitration is attached hereto and made a part hereof as Exhibit "C."

8.

The Arbitration involves the same Agreement, the same individual documents executed by the parties as a part thereof, and the same fact and legal issues which are the subject of the Complaint in this action.

9.

St. Paul filed its Answer and Counterclaim in this action subject to and asserting its position that the issues in this action should be arbitrated in the Arbitration, and that this action should be stayed or dismissed.

Further Affiant sayeth not.

/s/ Robert A. Wheeler
Robert A. Wheeler

Sworn to and subscribed before me
this 21st day of April, 1995.

/s/ Maryann M. Brogan
Notary Public

MARYANN M. BROGAN

My Commission Expires: NOTARY PUBLIC OF NEW JERSEY
My Commission Expires
May 21, 1995

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE, Plaintiff [sic],	)	CIVIL ACTION NO. E-35589
vs.	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY and ALVIN BARGE, Defendants.	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiff in Counterclaim,	)	
vs.	)	
JOHN M. BARGE and OLIVIA L. BARGE, Defendants in Counterclaim.	)	

SUPPLEMENTAL AFFIDAVIT OF ROBERT A. WHEELER IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING ARBITRATION

Personally appeared before the undersigned officer duly authorized to administer oaths, Robert A. Wheeler, who after being first duly sworn, deposed and stated under oath as follows:

1.

This affidavit supplements that affidavit previously given by me in this action dated April 21, 1995.

2.

I was the senior Authorized Representative for St. Paul Fire and Marine Insurance Company ("St. Paul") in those negotiations with Barge-Wagener, Inc. ("BWI") and the indemnitors under the indemnity agreement dated November 26, 1993 (Exhibit "A" to my affidavit of April 21, 1995), including John M. Barge and Olivia L. Barge, which led to the execution of that agreement dated May 18, 1994 (Exhibit "B" to my Affidavit of April 21, 1995) pursuant to which St. Paul provided funding to BWI ("May 18, 1994 Agreement").

3.

One of the more important terms of the May 18, 1994 Agreement to St. Paul was for St. Paul to obtain tax refunds totalling approximately $600,000 which were represented as due or to become due John M. Barge and Olivia L. Barge and John H. Wagener on their personal federal and state income taxes. These tax refunds were offered to St. Paul, along with a security interest in other property, as in inducement to St. Paul for St. Paul to advance funds to BWI rather than exercise other options of St. Paul less favorable to BWI. St. Paul accepted these refunds as a means of repaying St. Paul in part for the considerable funding that was anticipated to be advanced BWI under the May 18, 1994 Agreement. Accordingly, Paragraph 3(b) was inserted in the May 18, 1994 Agreement which states in pertinent part as follows:

TAX REFUNDS. To reduce the anticipated indebtedness to St. Paul under this Agreement and related documents,

BWI, John M. Barge, Olivia L. Barge, and John H. Wagener hereby assign to St. Paul all of their right, title and interest in and to any federal and state tax refunds due or to become due, for tax years 1995 and earlier, and for the tax year 1996 to the extent they, or any of them, receive payment of any income from BWI or any affiliate thereof, including, *inter alia*, Charter Properties, Inc. And Medallion Capital Group. Such finds shall be paid to St. Paul as Collateral Agent and distributed in accordance with the Intercreditor Agreement defined in subparagraph E.

4.

Although it was requested by John M. Barge that Olivia L. Barge not be required to execute the May 18, 1994 Agreement and other documents executed in connection therewith, on behalf of St. Paul I refused that request and required that Olivia L. Barge execute the documents that she executed. Regarding the tax refunds, it was essential to St. Paul that Olivia L. Barge sign the May 18, 1994 Agreement and the other documents she executed in connection therewith so that her property interest as a joint filer and joint payee for the tax refunds would be conveyed to St. Paul. Olivia L. Barge's execution was also necessary in order to assure St. Paul that whatever interests she had or later acquired in other property conveyed to St. Paul under the May 18, 1994 Agreement, was in fact conveyed to St. Paul, because St. Paul was relying upon all assets identified in the May 18, 1994 Agreement, and to assure St. Paul that those assets would not be depleted later by gift or other transfer to Olivia L. Barge. Further, Olivia L. Barge's execution was essential to assure St. Paul that the obligations of Olivia

L. Barge under the November 26, 1993 General Agreement of Indemnity would continue after the May 18, 1994 Agreement and that she would not be released or otherwise relieved of liability by the May 18, 1994 Agreement.

5.

St. Paul would not have entered into the May 18, 1994 Agreement and provided funding to BWI if Olivia L. Barge had refused to sign the Agreement and the documents executed by her in connection therewith, because St. Paul did not view BWI, its affiliates, John M. Barge and John H. Wagener sufficiently creditworthy in the absence of her execution.

6.

Funds were advanced under the May 18, 1994 Agreement as loans to BWI which were documented by promissory notes. The loans were used to pay obligations of BWI which were not bond obligations of St. Paul, as well as obligations of BWI which were also obligations of St. Paul under surety bonds issued by St. Paul. Significant payments were made, and continue to be made, by St. Paul for such non-bonded expenses as BWI payroll, BWI overhead, and installment loan payments to First Union Bank for which John M. Barge and John H. Wagener are personally liable as indemnitors (First Union payments now discontinued by St. Paul). St. Paul would not have paid such non-bonded obligations of BWI if the May 18, 1994 Agreement had not been executed by all parties including Olivia L. Barge.

7.

It is my understanding of the May 18, 1994 Agreement, including the documents executed in connection therewith, including *inter alia* the Pledge Agreement – Pari Passu and the intercreditor Agreement, dated May 18, 1994, that John M. Barge and Olivia L. Barge were and are required to pay to St. Paul, when received, the personal income tax refunds for tax years 1995 and earlier and for the tax year 1996 to the extent that they, or any of them, receive payment of any income from BWI or any affiliate thereof, and that St. Paul would then be required to disburse those proceeds to itself and Alvin Barge in accordance with the terms of the Intercreditor Agreement. Copies of the Pledge Agreement – Pari Passu and Intercreditor Agreement are attached hereto and made a part hereof as Exhibits "A" and "B.".

Further affiant sayeth not.

/s/ Robert A. Wheeler
Robert A. Wheeler

Sworn to and subscribed before me
this 14th day of June, 1995.

/s/ Maryann M. Brigton
Notary Public

My Commission Expires: May 21, 1995

APPENDIX L

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. E-35589
ST. PAUL FIRE AND MARINE INSURANCE COMPANY and ALVIN BARGE, Defendants.	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiff in Counterclaim,	)	
vs.	)	
JOHN M. BARGE and OLIVIA L. BARGE, Defendants in Counterclaim.	)	

AFFIDAVIT OF VIRGIL JOSEPH DOLPH IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING ARBITRATION

Personally appeared before the undersigned officer duly authorized to administer oaths, Virgil Joseph Dolph, who after being first duly sworn, deposed and stated under oath as follows:

1.

I have personal knowledge of the facts herein stated, am over 21 years of age and under no legal disability, and make this Affidavit for all purposes permitted by law.

2.

I am Resident Vice President in Atlanta, Georgia of Seaboard Surety Company, a New York corporation, which is a wholly-owned subsidiary of St. Paul Fire and Marine Insurance Company, a Minnesota Corporation. In this capacity I oversaw and was responsible for obtaining execution of the General Agreement of Indemnity dated November 26, 1993 by Barge-Wagener, Inc. ("BWI") and the various indemnitors executing said agreement, including John M. Barge and Olivia L. Barge, in favor of Seaboard Surety Company, St. Paul Fire and Marine Insurance Company and other affiliated corporations in connection with certain surety obligations incurred and to be incurred by St. Paul Fire and Marine Insurance Company ("St Paul") on behalf of BWI. A copy of said agreement is attached hereto and made a part hereof as Exhibit "A."

3.

Prior to the execution of the November 26, 1993 General Agreement of Indemnity, St. Paul held the General Agreement of Indemnity dated March 25, 1985 executed by Barge-Wagener, Inc. and the Indemnity Agreements – Third Party Indemnitor dated June 2, 1986 executed by John M. Barge and John H. Wagener. The

principal reason for obtaining a new General Agreement of Indemnity in the Fall of 1993 was to obtain the personal indemnity of Olivia L. Barge as a condition of granting any further suretyship on behalf of BWI, because St. Paul had determined that BWI, its affiliates, John M. Barge and John H. Wagener were no longer sufficiently creditworthy without Olivia L. Barge's indemnity.

4.

The two principal reasons for acquiring Olivia L. Barge's indemnity were (1) for St. Paul to be able to rely on the assets reflected in financial statements provided by John M. Barge to St. Paul without risk that his wife, Olivia L. Barge, in fact had some property interest therein that could conflict with St. Paul's interest, and (2) for St. Paul to be assured that the assets of BWI, its affiliates and John M. Barge being relied upon in the extension of credit by St. Paul would not be depleted by gifts or other transfers from BWI, BWI's affiliates or John M. Barge to Olivia L. Barge.

5.

St. Paul was advised by John M. Barge that Olivia L. Barge was agreeable to furnishing her personal indemnity provided that there be excluded from that indemnity certain of her assets and potential future assets. Accordingly, negotiations were had on those exclusions which ultimately resulted in the language contained in Paragraph 22 of the General Agreement of Indemnity of

November 26, 1993, that excluded certain of her assets and potential future assets.

6.

Following execution of the November 26, 1993 General Agreement of Indemnity and in reliance thereon, St. Paul issued further bonds on behalf of BWI, as follows:

(1) 400JM0772 (3-8-94) - $2,719,000 - Gwinnett County - performance and payment bonds - Duluth, Georgia Booster Pump Station.

(2) 400JM0788 (3-31-94) - $2,500.00 - Fulton County - 15 month maintenance bond - Abernathy Square Shopping Center.

(3) 400JM0794 (4-7-94) - $630,000.00 - GSFIC - 5 year Roof and Wall Maintenance Bond.

(4) Bid Bond (1-27-94) - $2,500,000.00 estimate - City of Dalton, Georgia - pump station.

(5) Bid Bond (1-6-94) - $500,000.00 estimate - Emory University - renovation and addition to Cell Separator Lab.

(6) Bid Bond (12-20-93) - $500,000.00 estimate - Lockheed, Georgia - addition to low speed wind tunnel building.

7.

Following the execution of the May 18, 1994 Agreement, in reliance on the November 26, 1993 General Agreement of Indemnity and the May 18, 1994 Agreement, an amendment to bond was issued by St. Paul on the Greenville, South Carolina Hospital, Bond No. 400JL2803, increasing the existing bonds in favor of the

Greenville, South Carolina Hospital System, as obligee, from $5,498,382 to $10,954,004 to add an additional project to the original contract.

Further affiant sayeth not.

/s/ Virgil J. Dolph
VIRGIL JOSEPH DOLPH

Sworn to and subscribed before me
this 15th day of June, 1995.

/s/ Betsy J. Holmes
Notary Public
My Commission Expires: Nov. 5, 1995.

APPENDIX M

SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE,	*	
Plaintiffs,	*	CIVIL ACTION
vs.	*	NO.
ST. PAUL FIRE AND MARINE INSURANCE COMPANY and ALVIN BARGE,	*	E-35589
	*	JUDGE LONG
	*	(Filed
Defendants.	*	Jul. 13, 1995)

AFFIDAVIT OF JOHN BARGE

STATE OF GEORGIA
COUNTY OF FULTON

1.

My name is John Barge and this affidavit is made upon my personal knowledge.

2.

I have been the chief executive officer of Barge-Wagener, Inc., n/k/a 1815 Exchange Inc. ("BWI"), since 1984 through the present. During that time period, I have prepared over 150 bids for construction projects and am familiar with the costs associated with completing the projects for which St. Paul issued payment and performance bonds for BWI.

3.

I have reviewed the affidavits of Robert Wheeler and Joseph Dolph filed in this case and file this affidavit in response and opposition to them.

4.

In his affidavit, Mr. Wheeler identifies himself as the "senior Authorized Representative for St. Paul Fire and Marine Insurance Company". I understand that Mr. Wheeler is an attorney employed in-house by St. Paul.

5.

St. Paul issued both payment and performance bonds for BWI. Payment bonds are issued to ensure that all subcontractors, suppliers and materialmen for a project are paid and the performance bond is issued to guaranty [sic] the owner that the project will be completed in accordance with the construction contract. As the surety issuing these bonds, St. Paul was financially responsible for these obligations.

6.

In paragraph 3 of his affidavit, Mr. Wheeler states that St. Paul advanced funds to BWI pursuant to the May, 1994 agreement "rather than exercise other options of St. Paul less favorable to BWI." That is not true. In point of fact, the May, 1994 agreement was entered into by St. Paul because it was already legally obligated to the owners of

the projects to complete them and utilizing BWI to complete the projects was the most favorable and economically efficient course of action for St. Paul to take.

7.

At the time the May, 1994 agreement was executed, BWI was in default of construction contracts for which St. Paul had issued performance bonds and BWI did not have sufficient funds with which to make payroll and remain in business. Had BWI shut down in May, 1994, its employees would have been terminated and sought work elsewhere. St. Paul would have had to identify and employ a replacement contractor to complete the projects. Based on my experience of over 20 years in the contracting business, no replacement contractor would agree to undertake completion of a defaulted job except on a cost plus overhead and profit basis. That cost would be exacerbated by the need for the new contractor to familiarize itself with the project and its paperwork, mobilize on site and obtain equipment for use on the job. In addition, if BWI shut down, then another lender, First Union, would repossess the equipment being used on the bonded jobs and would also begin foreclosure proceedings on its warehouse building and equipment yard. The total delay caused by this disruption of work would probably delay the completion of each of the bonded jobs by at least two months.

It is my opinion based on over 20 years in contracting business and having estimated bids for over 150 jobs, that the loss to St. Paul for completing a defaulted project with a replacement contractor would be at least 2 to 2.5

times as much as it would be by completing the job with the original contractor. This is the reason why most bonding companies generally try to keep the original contractor in place to complete a job, even if it is in default of its obligations. Indeed, this cost factor and potential savings was discussed with Mr. Wheeler in May, 1994 when the agreement was being negotiated. I am convinced that St. Paul would not have entered into the May, 1994 agreement had it not thought it was cheaper and more economical for it to do so. Keeping BWI in business was the best alternative for St. Paul. The May, 1994 agreement was nothing more than a reaffirmation of St. Paul's obligations and duties under the payment and performance bonds which it had issued.

8.

On other hand, if BWI remained operating, the employees who were familiar with and worked on the jobs would remain in place. In order for BWI to remain operating, it was necessary for its office staff to remain in place. This office staff handled payroll and maintained the records for the various BWI jobs. This is a cost that any replacement contractor would have charged to St. Paul.

9.

In paragraph 6 of his affidavit, Mr. Wheeler stated that St. Paul made significant payments for non-bonded expenses such as payroll, BWI overhead and installment payments to First Union Bank. No payments were made First Union Bank. Instead, payments were made to

Medallion Capital Group to lease equipment from it which was encumbered by a lien held by First Union. These lease payments to Medallion were made to enable BWI to retain possession and use of equipment for the bonded jobs. It was specifically discussed with St. Paul and it agreed that paying Medallion Capital Group to retain use of the equipment on the bonded jobs was cheaper and more economical than if St. Paul had to rent equipment on the spot market. When St. Paul decided that the equipment was no longer necessary, it stopped paying lease payments to Medallion Capital Group. It was in St. Paul's direct economic interest to pay the Medallion Capital Group for as long as it did in order to have use of the equipment to complete the bonded jobs.

10.

As to Mr. Wheeler's contentions regarding overhead, St. Paul insisted that although the non-bonded jobs comprised only a small portion of the total work of BWI, they had to bear a share of the overhead. Furthermore, the overhead such as payroll for headquarters employees (neither my nor Mr. Wagener's salaries were ever paid by St. Paul) were necessary to complete the bonded jobs. These employees performed services such as maintaining payroll records, jobs files, assisting in the prosecution and defense of claims arising out of the bonded jobs and performing other work directly related to the ongoing performance of the bonded jobs.

11.

In total, St. Paul will ultimately advance less pursuant to the May, 1994 agreement than if BWI had ceased doing business in May, 1994 and St. Paul had to perform under its payment and performance bonds. St. Paul has not expended any more funds pursuant to the May, 1994 agreement than it was already liable for pursuant to its outstanding bonds, and probably less. Since St. Paul was only reaffirming its obligations under its payment and performance bonds for which St. Paul had already made a credit decision, the requirement that Olivia Barge pledge her property was only an attempt to encumber her assets for the obligations of BWI. Olivia Barge has never been an officer, director or shareholder of BWI.

12.

In his affidavit, Mr. Dolph states that relying on the May, 1994 agreement, St. Paul issued an amendment to the bond issued by it on the Greenville, South Carolina Hospital Bond No. 400JL2803, St. Paul was already obligated under its outstanding bid bond for this project to issue this amendment prior to May, 1994. Had it failed to do so, then its refusal would jeopardize its credibility in the marketplace with project owners in the much the same way that a bank's refusal to honor a letter of credit would jeopardize its credibility in the financial marketplace. In addition, if it failed to issue the bond amendment, St. Paul would have been liable to the Greenville Hospital for $272,781.10 as a penalty under the bid bond for refusing to issue the amendment to the bond. St. Paul could not have relied on the May, 1994 agreement in

agreeing to issue the increase in the Greenville Hospital Bond.

13.

Olivia Barge is not now nor has she ever been an officer, director or sharholder [sic] of Barge Wagener Inc. She has never been involved in the day to day management or operation of Barge Wagener, Inc.

This the 12th day of July, 1995.

/s/ John Barge
John Barge

Sworn to and subscribed
before me this 12th day
of July, 1995.

/s/ Shirley A. Kirker
NOTARY PUBLIC
My Commission Expires:
January 12, 1998
[NOTARIAL SEAL]

CERTIFICATE OF SERVICE

This is to certify that the foregoing **AFFIDAVIT OF JOHN BARGE** was served on the following by depositing same in the United States First-Class Mail with sufficient postage affixed thereon to ensure delivery addressed as follows:

Edward Wasson, Esq.
Wasson, Sours & Harris
300 Galleria Parkway, N.W.
Suite 1000
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Dean Booth, Esq.
BOOTH, WADE & CAMBELL
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Suite 1500
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This the 13 day of July, 1995.

/s/ John A. Christy
John A. Christy
Georgia Bar No. 125518
Attorney for Plaintiff

SCHREEDER, WHEELER, & FLINT
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(2)

Supreme Court, U.S.
FILED
OCT 29 1997
CLERK

No. 97-551

In The
Supreme Court of the United States

October Term, 1997

JOHN M. BARGE AND OLIVIA L. BARGE,
Petitioners,

v.

ST. PAUL FIRE AND MARINE INSURANCE CO.,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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2. This Case Does Not Present an Important or Compelling Federal Question, and Thus Is Inappropriate for Review by this Court. 16

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APPENDIX

N. May 1994 Agreement. 1b

O. Answer and Counterclaim of St. Paul Fire and Marine Insurance Company, filed March 31, 1995. 22b

P. Motion to Stay Proceedings Pending Arbitration and Brief in Support of Motion to Stay Proceedings Pending Arbitration, filed April 24, 1995. 35b

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Preiser v. Newkirk, 422 U.S. 395, 95 S.Ct. 2330, 45 L.Ed 2d 272 (1975).	13

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 73-74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955). 17

Securities and Exchange Commission v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 350 (1972). 15

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 1092 S.Ct. 752, 70 L.Ed.2d. 700 (1982). 13

OPINIONS BELOW

The statement of Opinions Below as set forth in Petitioner's Petition for Writ of Certiorari is hereby adopted.

JURISDICTION

This Court lacks jurisdiction to consider this case, because the issue raised by Petitioners is moot, and thus there is no pending case or controversy. Furthermore, this Court should not take jurisdiction because there is no substantial, important federal question present.

SUMMARY OF ARGUMENT

Respondent's first argument is that the issue raised by Petitioners, i.e. whether the Equal Credit Opportunity Act ("ECOA") can be used defensively, is moot because the Superior Court of Fulton County, Georgia ruled on September 8, 1995 that there was in fact no violation of the ECOA by St. Paul regarding the subject arguments. This ruling was not appealed by the Barges. Following conclusion of the appeals on other issues, with acknowledgment by counsel for all parties that no other issues remained in the case, the case was administratively closed, effective August 1, 1997. Therefore, even if Petitioners should prevail on their assertion that the ECOA can be used defensively, there would be no change in result as between the Barges and St. Paul since this issue has already been decided on the merits in St. Paul's favor in a final, binding ruling which cannot be appealed or re-litigated.

Since the ECOA issue is moot, there is no case or controversy, and consequently, this Court lacks jurisdiction.

Respondents' second argument is that in the twenty-two years the ECOA has been in effect, there has been comparatively little litigation on the issue of raising the ECOA defensively, with only **one** Circuit Court of Appeals addressing the issue. Therefore, it is submitted that Petitioners have not shown there is a sufficiently important or substantial federal question which compels this Court's attention.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. STATEMENT OF THE CASE AND PROCEDURAL HISTORY*

Appellees John M. Barge and Olivia L. Barge (collectively referred to as the "Barges") are two indemnitors under a General Agreement of Indemnity dated November 26, 1993 (the "Indemnity Agreement") in favor of St. Paul Fire and Marine Insurance Company ("St. Paul"), in reliance on which St. Paul provided construction surety bonds on behalf of Barge-Wagener, Inc., a general contractor (now known as 1815 Exchange, Inc.) ("BWI").

Prior to execution of the Indemnity Agreement, St. Paul held a General Agreement of Indemnity dated March 25, 1985 executed by BWI and Third Party

---

* Citations A through M with page numbers bearing suffix "a" are to the Appendices attached to the Petition for Certiorari. Citations N through Q with page numbers bearing suffix "b" are to the Appendices attached to this Brief.

Indemnity Agreements dated June 2, 1986 executed by John Barge and John Wagener. (L. 87a).

The Indemnity Agreement was required by St. Paul in 1993 as a condition to St. Paul's granting any further suretyship on behalf of BWI because St. Paul had determined that BWI, and the existing indemnitors, John Barge and John Wagener, were no longer sufficiently creditworthy without Olivia Barge's indemnity. (L. 87a-88a). The two principal reasons for requiring Olivia Barge's indemnity in November, 1993 were: (1) for St. Paul to be able to rely on the assets reflected in financial statements provided by John Barge to St. Paul, without risk that Olivia Barge had some property interest therein that could conflict with St. Paul's interest, and (2) for St. Paul to be assured that the assets upon which it was relying in the extension of credit would not be depleted by gifts or other transfers from BWI, its affiliates or John Barge to Olivia Barge. (L. 88a). St. Paul was advised by

John Barge that Olivia Barge was agreeable to furnishing her personal indemnity provided that there were excluded from that indemnity certain of her assets and potential future assets. Negotiations were conducted on those exclusions which ultimately resulted in the language contained in Paragraph 22 of the Indemnity Agreement. (L. 88a-89a). In reliance on the new Indemnity Agreement, St. Paul issued further construction surety bonds on behalf of BWI. (O. 30b, P. 43b, K. 77a, L. 89a-90a).

BWI began having severe financial difficulties in the Spring of 1994, and sought funding from St. Paul to complete construction of the projects on which St. Paul had furnished performance and payment bonds. (O. 30b, P. 43b). BWI, St. Paul, the Barges, and certain other parties reached an agreement concerning funding, which was memorialized in an agreement dated May 18, 1994. (the "May 1994 Agreement"). (O. 30b, P. 43b-44b, K. 77a, N. 1b-21b).

Among other things, under the May 1994 Agreement, the Barges, BWI and others assigned certain property (including tax refunds payable to the Barges on their personal federal and state income taxes, in which Olivia Barge claims a one-half interest) and conveyed security interests in other property to St. Paul. In exchange, St. Paul provided financing to BWI for completion of the projects bonded by St. Paul, and for other purposes. (N. 1b-21b). All disputes under the Indemnity Agreement, the May 1994 Agreement and the other documents executed therewith were to be resolved by arbitration. (N. 15b, N. 19b).

It was essential to St. Paul that Olivia Barge execute the May 1994 Agreement and the other documents she executed in connection therewith (1) to convey her property interest in the tax refunds to St. Paul, (2) to assure St. Paul that whatever interest Olivia Barge had or later acquired in the assets conveyed to St. Paul under the May

1994 Agreement was in fact conveyed to St. Paul (3) to assure St. Paul that those assets would not be depleted later by gift or other transfer to Olivia Barge, and (4) to avoid releasing Olivia Barge from the Indemnity Agreement. (K. 83a-84a). St. Paul would not have entered into the May 1994 Agreement and provided funding to BWI if Olivia Barge had not signed the May 1994 Agreement and the documents executed by her in connection therewith, because St. Paul did not view BWI, its affiliates, and John Barge and John Wagener as sufficiently creditworthy in the absence of her execution. (K. 84a).

With execution of the May 18, 1994 Agreement, St. Paul commenced the funding of completion of the construction projects St. Paul had bonded for BWI, and provided payment of BWI obligations on those projects, and payment of other non-bonded obligations to keep BWI in business. (K. 84a).

Shortly after the execution of the May 1994 Agreement, a dispute arose between St. Paul and the Barges concerning the tax refunds. On January 25, 1995, St. Paul instituted arbitration proceedings before the American Arbitration Association against the Barges, to recover the tax refunds, pursuant to the arbitration clause of the May 1994 Agreement. (N. 15b).

On February 10, 1995 the Barges filed a declaratory judgment action in the Superior Court of Fulton County, Georgia (the "Superior Court") against St. Paul and others (F. 48a) seeking: 1) a declaratory judgment that arbitration was not required of the tax refund dispute (F. 52a-53a); 2) a declaratory judgment that Olivia Barge owned a one-half interest in the tax refunds and that any security interest or lien granted by Olivia Barge to St. Paul was void as a matter of law under the Equal Credit Opportunity Act

(the "ECOA") (F. 52a-53a); and 3) a stay of the arbitration proceedings. (F. 53a).

On March 31, 1995 St. Paul filed its Answer and Counterclaim, (O. 22b-34b) and on April 24, 1995 St. Paul filed a Motion to Stay Proceedings Pending Arbitration. (P. 35b-51b).

On July 13, 1995 the Barges filed an Amendment to Complaint, adding a count seeking a declaratory judgment that the Indemnity Agreement and the May 1994 Agreement were void as a matter of law as to Olivia Barge under the ECOA. (G. 63a-66a).

Following oral argument, the Superior Court by its Order of September 8, 1995 (C. 11a-22a) held, among other things not at issue here: 1) the ECOA cannot be asserted defensively (C. 12a-13a); 2) there was in fact no ECOA violation with respect to either the Indemnity Agreement or the May 1994 Agreement (C. 13a-16a); and 3)

the arbitration should proceed (C. 16a-21a). Thereafter, the arbitration proceedings resumed.

Later in connection with the arbitration an issue unrelated to the Petition for Certiorari arose on which the Superior Court issued an order adverse to St. Paul, and St. Paul applied for and was granted a Certificate of Immediate Review on June 19, 1996. (H. 67a-68a). On July 26, 1996 the Barges cross-appealed that portion of the September 8, 1995 Order which held that the ECOA could not be asserted defensively. (I. 69a-72a).

On February 27, 1997, the Georgia Court of Appeals affirmed the Superior Court's September 8, 1995 Order, finding that it was not error for the Superior Court to prohibit Olivia Barge from asserting the ECOA as a defense to her liability. (B. 2a-10a).

The Georgia Court of Appeals declined to reconsider its decision on March 12, 1997, (D. 23a) and the

Georgia Supreme Court denied the Barges' Petition for Certiorari on June 27, 1997. (A. 1a).

On October 6, 1997 the Superior Court of Fulton County entered its Order, reciting that the judgment of the Court of Appeals was made the judgment of the Superior Court on August 1, 1997, and that,

> "As the parties have agreed that no other issues remain in the underlying case, the above-referenced action has been administratively closed, effective August 1, 1997."

(Q. 52b).

The Barges filed their Petition for Certiorari in this Court on September 29, 1997.

B. REASONS FOR DENYING THE WRIT

1. This Court Lacks Jurisdiction over Petitioners' Appeal Because the Issue Presented for Review Was Rendered Moot by the Specific Finding of the Superior Court of Fulton County, Georgia That There Was No Violation of the Equal Credit Opportunity Act.

This case is improper for review by this Court because there is no ongoing case or controversy regarding the issue raised in the Petition concerning the Equal Credit Opportunity Act ("ECOA") (15 U.S.C. §1691-1691f), and Petitioners will not therefore be affected by any ruling of this Court on the issue presented for review. The issue presented by Petitioners in their Petition, i.e. whether a violation of the Equal Credit Opportunity Act ("ECOA") may be asserted defensively to avoid an obligation, is moot. In their Petition, Petitioners failed to mention that the Superior Court of Fulton County, Georgia (the "Superior Court") made the

specific finding that there was in fact no violation of the ECOA. In Part 2 of its September 8, 1995 Order, after a full discussion of the facts, the Court stated: **"[T]he Court finds that there was no ECOA violation with respect to either of the disputed agreements."** (Emphasis added) (C. 11a). That finding has never been challenged or appealed by Petitioners, and is not at issue here. Following exhaustion of Petitioners' appeals, the case was returned to the Superior Court. In its Order of October 6, 1997 the Superior Court stated:

> The judgment of the Court of Appeals of the State of Georgia was made the judgment of this Court on August 1, 1997. **As the parties have agreed that no other issues remain in the underlying case, the above-referenced action has been administratively closed, effective August 1, 1997.**

(Emphasis added) (Q. 52b).

Thus, whether or not the ECOA may be asserted defensively by Olivia Barge to avoid her obligation

is moot since there is a final and binding judgment not subject to appeal that there is no violation of the ECOA regarding the subject agreements of this case.

This Court does not have jurisdiction to "give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green,* 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895); *see also, North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971).

> "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1994, 1950, 23 L.Ed.2d 491 (1969). Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief. *See Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 514, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911); 6A J. Moore, J. Lucas & G. Grotheer, Moore's

Federal Practice ¶57.13, at 57-123 to 57-127 & n. 11 (1986) (citing cases).

Carrass v. Williams, 807 F.2d 1286, 1289 (6th Cir., 1986).

It is well settled that under Article III of the United States Constitution, federal courts, including the Supreme Court, may only adjudicate actual, ongoing cases or controversies. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 199, 108 S. Ct. 523, 98 L.Ed.2d 529 (1988); *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975). The federal courts are restricted to adjudging the legal rights of litigants in real, earnest and vital controversies. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471, 1092 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). Article III also requires that the party seeking review show that he himself is adversely affected, and that he has a direct stake in the outcome of the court's decision. *Valley Forge, supra*, 454 U.S. at 472, 102 S.Ct. at 758.

> Article III of the Constitution denies federal courts the power "to decide questions that cannot affect the rights of the litigants in the case before them," *North Carolina v. Rice*, 404 U.S. 244, 246, 30 L.Ed.2d 413, 92 S.Ct. 402 (1971), and confines them to resolving "'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Ibid.* (quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241, 81 L.Ed. 617, 57 S.Ct. 461, 108 ALR 1000 (1937)).

Lewis v. Continental Bank Corp., 494 U.S. 472, 477, 110 S.Ct. 1249, 1253, 108 L.Ed.2d 400, 411 (1990).

"Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70, 104 S.Ct. 373, 374-75, 78 L.Ed.2d 58 (1983). If a federal court of appeals cannot render any effectual relief in favor of appellant, the appeal must be dismissed as moot. *Mills, supra; Calderon v. Moore*, ____ U.S. ____, 116 S.Ct. 2066, 2067, 135 L.Ed.2d

453 (1996). The Supreme Court's lack of jurisdiction to review moot cases derives from the Article III limitation of federal judicial power to cases or controversies. *Securities and Exchange Commission v. Medical Committee for Human Rights,* 404 U.S. 403, 407, 92 S.Ct. 577, 580, 30 L.Ed.2d 350 (1972).

Petitioners have failed to demonstrate a live controversy involving the issue presented for review. On September, 8, 1995, the Superior Court made a specific finding that no violation of the ECOA exists under the facts of this case. This finding was not appealed, and following appeals regarding other issues including Petitioners' unsuccessful appeal on using the ECOA defensively, the Superior Court closed the case upon acknowledgment by counsel for both sides that no issues remained in the case. Therefore, the question as to whether the ECOA can be asserted by the Barges as an affirmative defense to St. Paul's

claim is moot. If, hypothetically, this Court were to rule in favor of Petitioners and hold that the ECOA could be used defensively to avoid liability, there would be no change in the end result because of the Superior Court's ruling there was in fact no violation of the ECOA by St. Paul, and thus the subject agreements remain enforceable.

Accordingly, any opinion rendered in this case upon the question presented would be a prohibited advisory opinion. "'[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 95, 96, 88 S.Ct. 1942, 1949, 20 L.Ed.2d 947 (1968).

2. This Case Does Not Present an Important or Compelling Federal Question, and Thus Is Inappropriate for Review by this Court.

The federal question presented must be substantial and important to afford the basis for appellate

review. "A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10, 28 U.S.C.A. The Supreme Court is a court of limited reviewing power, and may not grant certiorari to review a state court judgment in the absence of a substantial, important federal question. *See, e.g., Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955). It is not enough that the question raised presents an interesting problem, or that the issue is important to the particular litigants. The requirement of a substantial federal question "impl[ies] a reach to a problem beyond the academic or the episodic." *Rice, supra,* 349 U.S. at 74, 75 S.Ct. at 616.

The issue presented by Petitioners is not of substantial federal importance, and does not deserve this Court's time. The Petition itself proves the point. The ECOA was enacted in 1974, and became effective in 1975.

The subsequent amendments to the ECOA did not affect the operative language relevant to this dispute. For litigation on the subject issue during the twenty-two year time frame since 1975, Petitioners can cite to only **one** Federal Circuit Court decision (Pet. p. 12, *Silverman v. Eastrich Multiple Investor Fund*, 51 F.3d 28 (3rd Cir. 1995), ruling in Petitioners' favor); and ten lower federal court decisions (Pet. pp. 13-14), six in their favor and four against, none of which were apparently appealed to a Circuit Court on the subject issue. Finally, Petitioners cite to only three state court decisions on the subject, one in Virginia and two in Maine in their favor. Additionally, there have been two Georgia state cases on point, including the case at bar, both holding against Petitioners, for a total of five state court decisions on the issue. Plainly, this litigation history does not reflect a highly contested critical issue involving a federal statute which compels this Court's attention.

It is submitted Petitioners have filed their petition solely for the purpose of further delaying completion of the arbitration proceedings which were commenced in January, 1995, and this Court should therefore not grant certiorari.

CONCLUSION

This case does not meet the case or controversy requirement of the United States Constitution because the issue raised by the Petitioners is moot; therefore, the Petition of John M. and Olivia L. Barge should be denied. Furthermore, the Petition should be denied because the question presented for review is not a compelling or important issue warranting this Court's review.

Respectfully Submitted,

EDWARD H. WASSON, JR.
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ATTORNEYS FOR RESPONDENTS ST. PAUL FIRE AND MARINE INSURANCE CO.

APPENDIX

APPENDIX N

AGREEMENT

ENTERED into this 18th day of May, 1994, between ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota corporation, having its principal place of business at 35 Washington Street, St. Paul, Minnesota 55102, referred to as "St. Paul"

AND

BARGE-WAGENER, INC., a Georgia corporation having its principal place of business at 1815 The Exchange, Atlanta, Georgia, hereinafter referred to as "BWI;" and JOHN M. BARGE, JOHN H. WAGENER and OLIVIA L. BARGE, all residents of Atlanta, Georgia, and MEDALLION CAPITAL GROUP, a Georgia general partnership, hereinafter collectively referred to as "Indemnitors."

WHEREAS, BWI, together with the Indemnitors, jointly and severally executed and delivered to St. Paul a Contractor's General Agreement of Indemnity, attached hereto as Exhibit "A," by the terms of which BWI and the Indemnitors agreed to indemnify and hold harmless St. Paul from and against any and all losses, costs, damages and expenses which St. Paul might sustain or incur as the result of or arising out of the execution of bonds, as surety, for BWI, as principal; and

WHEREAS, BWI entered into a number of construction contracts, and St. Paul issued performance and payment bonds for said contracts, which contracts are

identified in Exhibit "B" attached hereto and are hereinafter collectively referred to as the "Bonded Contracts;" and

WHEREAS, BWI and the Indemnitors are in default of their obligations to St. Paul under the terms of the Contractor's General Agreement of Indemnity; and

WHEREAS, BWI is experiencing cash flow difficulties which, if not mitigated, will have an adverse impact upon the work under the Bonded Contracts; and

WHEREAS, BWI has requested financial assistance from St. Paul to continue meeting its various obligations under the Bonded Contracts and to continue paying suppliers and subcontractors and certain general and administrative expenses, and St. Paul has agreed to provide financial assistance subject to the terms and conditions of this Agreement; and

WHEREAS, BWI, the Indemnitors and St. Paul believe that, in order to mitigate damages and lessen costs, it is beneficial for them to cooperate in a joint effort to bring about a timely completion of the various Bonded Contracts:

NOW THEREFORE, intending to be legally bound, for and in consideration of the mutual promises, covenants and agreements contained herein, and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, BWI, the Indemnitors and St. Paul agree as follows:

1. ACKNOWLEDGMENT AND RATIFICATION. BWI and the Indemnitors hereby

acknowledge, confirm and ratify their joint and several obligations and liability to St. Paul under the Contractor's General Agreement of Indemnity and further acknowledge that said Contractor's General Agreement of Indemnity remains in full force and effect, except as expressly modified or amended by this Agreement. BWI and the Indemnitors agree that the terms, covenants, conditions and obligations created herein are intended to be in addition to and not in substitution for the rights and remedies presently vested in St. Paul by law and by the terms of the Contractor's General Agreement of Indemnity. BWI and the Indemnitors acknowledge that this Agreement does not in any way reduce the liability of BWI and the Indemnitors under the Contractor's General Agreement of Indemnity or increase the liability of St. Paul under performance and payment bonds issued in connection with the Bonded Contracts.

2. ADVANCES OF FUNDS. St. Paul agrees to make available to BWI advances of funds not to exceed a total of $4,000,000.00 in such amounts and at such times as St. Paul in its sole discretion deems necessary and appropriate: (1) to cover the amounts, if any, by which direct project expenses exceed project revenues for construction projects involving Bonded Contracts and (2) to cover BWI's ordinary monthly general and administrative expenses and vehicle, warehouse and equipment expenses necessary for completion of the Bonded Contracts. St. Paul reserves the right to discontinue advancing funds to BWI at any time without cause. With respect to said advances of funds, if any:

a. St. Paul will be secured in respect to BWI's indebtedness, as set forth in Section 3, hereof.

b. The advances of funds shall be evidenced by a Master Promissory Note payable to St. Paul and bearing interest at any adjustable annual rate equal to the prime lending rate of Trust Company Bank, Atlanta, Georgia, which BWI and the Indemnitors acknowledge may not be the lowest rate of interest charged to borrowers by Trust Company Bank. The Master Promissory Note shall be in the form attached hereto as Exhibit "C." It is understood and agreed that St. Paul may in its sole discretion determine it is necessary to advance funds in excess of the $4,000,000 face amount of the Master Promissory Note, in which event BWI and Indemnitors (excluding Olivia L. Barge) agree to execute like promissory note or notes in favor of St. Paul to evidence said additional indebtedness.

c. The funds will be deposited in special accounts at Trust Company Bank entitled "Barge-Wagener, Inc. Trust Account" and "Barge-Wagener, Inc. Trust Account - General" (hereinafter "Trust Accounts") subject to the addition of St. Paul as a named depositor on said accounts along with BWI. Transactions involving the Trust Accounts shall be governed by Section 6 hereof.

d. Upon any default of BWI under Section 8 hereof, St. Paul will be entitled to withdraw all funds then in the Trust Accounts and apply said funds as described in Section 8 hereof.

3. A. COLLATERAL SECURITY. To collateralize the advances of funds extended by St. Paul to BWI under the Master Promissory Note and any additional promissory note or notes executed by BWI and Indemnitors and to secure St. Paul against any future losses which it may sustain in respect to the Bonded Contracts, or the Contractor's General Agreement of Indemnity, BWI and Indemnitors will grant to St. Paul a security interest in and secured position with respect to any or all of BWI's corporate assets, Medallion's partnership assets and Indemnitors' personal assets, whether realty or personalty, as designated by St. Paul on Exhibit D attached hereto ("Collateral"). BWI and Indemnitors agree, upon demand of St. Paul, to execute and deliver to St. Paul from time to time such security agreements, pledge agreements, mortgages, deeds of trust and other collateral documents, together with related financing statements and other instruments, as St. Paul may request in order to fully evidence and grant to St. Paul security interests in the Collateral, wherever located, and to perfect the rights and secured position of St. Paul in the Collateral. All proceeds from the sale of the Collateral which would otherwise be due BWI and/or Indemnitors shall be paid to St. Paul to reduce the indebtedness hereunder to St. Paul.

B. TAX REFUNDS. To reduce the anticipated indebtedness to St. Paul under this Agreement and related documents, BWI, John M. Barge, Olivia L. Barge, and John H. Wagener hereby assign to St. Paul all of their right, title and interest in and to any federal and state tax refunds due or to become due, for tax years 1995 and earlier, and for the tax year 1996 to the extent they, or any of them, receive payment of any income from BWI or any affiliate thereof, including, inter alia, Charter Properties, Inc. and

Medallion Capital Group. Such funds shall be paid to St. Paul as Collateral Agent and distributed in accordance with the Intercreditor Agreement defined in subparagraph E. Further, John H. Wagener agrees to use his best efforts to obtain a release of any interest that his wife, Bonnie Wagener, may have in said federal and state tax refunds due or to become due. The form of said release shall be subject to St. Paul's approval, and said document shall be furnished to St. Paul upon execution by Bonnie Wagener.

C. HILTON HEAD PROPERTY. To secure his obligations under this Agreement and related documents John H. Wagener hereby grants to St. Paul a security interest in his residence at 12 Planters Road, Hilton Head, South Carolina, which shall constitute a third mortgage subordinate only to a first mortgage held by First Federal Savings, Greenville, S.C. ("First Federal") in the remaining unpaid principal balance of approximately $348,000 and a second mortgage held by First Federal in the remaining unpaid principal balance of approximately $215,000. It is further agreed that John H. Wagener shall use his best efforts to sell said residence, and upon sale of same, at closing the proceeds otherwise due John H. Wagener shall be paid St. Paul as Collateral Agent and distributed in accordance with the Intercreditor Agreement defined in subparagraph E. John H. Wagener warrants and represents to St. Paul that he has the sole title in said residence subject only to the aforesaid mortgages in the amounts stated. The form of said mortgage and other necessary documents shall be subject to St. Paul's approval, and said documents shall be furnished to St. Paul upon execution.

D. CHARTER PROPERTIES, INC. To secure their obligations under this Agreement and related documents John H. Wagener and John M. Barge hereby grant to St. Paul a security interest in all of their stock in Charter Properties, Inc. and their rights to receive monies and other proceeds from same, it being understood and agreed that if and when any monies or other proceeds would otherwise become payable to John H. Wagener or John M. Barge, said monies or other proceeds shall be paid to St. Paul as Collateral Agent and distributed in accordance with the Intercreditor Agreement defined in subparagraph E. The form of documents to effect the terms of this paragraph shall be subject to St. Paul's approval, and said documents shall be furnished to St. Paul upon execution.

E. The parties acknowledge that John M. Barge and John H. Wagener entered into a security agreement dated as of April 15, 1994 granting a security interest in the property described in subparagraphs B, C and D hereof to Alvin Barge. Simultaneously with the execution of this Agreement, Alvin Barge shall release and terminate this security interest and agreement in consideration of St. Paul and Alvin Barge entering into an Intercreditor Agreement which shall provide that Alvin Barge and St. Paul shall share on a pro rata basis in the security as provided for in the Intercreditor Agreement for repayment of their respective indebtedness.

F. WARRANTIES AND REPRESENTATIONS. Exhibits E-1 through E-14 attached hereto have been prepared and furnished by BWI, John M. Barge and John H. Wagener to St. Paul to induce St. Paul to advance funds under this Agreement, and to that end BWI

and Indemnitors (excluding Olivia L. Barge) warrant and represent to St. Paul that: they have provided all supporting financial information to the exhibits as requested by St. Paul; any projections represent an estimate of future performance of the respective jobs prepared by employees of BWI based on available information and assumptions; with respect to any financial statements, they are unaudited and subject to year-end adjustments and the valuation of assets therein was made on disclosed assumptions made by the preparer so that assuming that validity of those assumptions and to the best of the preparer's knowledge, they are not materially misleading overall; and that since preparation of said exhibits no transactions or events have occurred which would render the exhibits materially and adversely untrue except for factors affecting the assumptions upon which value was predicated for any assets. St. Paul acknowledges that it is aware that: the Overlook at Hamilton Place Shopping Center was sold in March, 1994; one of the BWT townhomes was sold in 1994; the financial condition of BWI deteriorated throughout 1993 and has continued; and any financial statements provided by or for BWI are unaudited and subject to adjustment so that ultimate losses may actually be greater than anticipated and as a result the ability of the company to remain a going concern is doubtful.

G. NON-WAIVER. It is understood and agreed by Indemnitors that the granting to St. Paul of rights and interests (including inter alia security interests) under this Agreement and related documents executed in connection herewith shall not waive, release, limit, modify or otherwise adversely affect any other rights and remedies St. Paul may have under this Agreement, related documents executed in connection herewith, the Contractor's General Agreement of

Indemnity (Exhibit "A" hereto) and otherwise existing by contract or by operation of law to recover monies owed it by Indemnitors.

4. PRIORITY RIGHT OF ST. PAUL. BWI and each of the Indemnitors agree that St. Paul, as surety, has a superior and priority right to the receipt of all funds due or to become due on the Bonded Contracts, including all sums earned but unpaid, earned and retained or unearned, and including all claims for extra work, change orders, damages for delays or additional compensation.

5. TRUST FUNDS. St. Paul and BWI recognize that the sums due or to become due on the Bonded Contracts (including, without limitation, all monies previously earned and in the future to be earned, all retainages previously withheld or to be withheld in the future, all claims for additions and extras and all claims for damages, if any) shall remain and continue to be trust funds for the payment of all subcontractor and supplier obligations and for all labor and materials bills on the Bonded Contracts; for payment of the expenses of the type enumerated in Section 2; for the prosecution and performance of all work on the Bonded Contracts; for the indemnity of St. Paul as to all costs and expenses incurred by St. Paul in the completion of the work on the Bonded Contracts including, inter alia, payment for materials and labor, consulting, engineering and other professional fees and expenses, including attorneys' fees, of such professionals; and to repay St. Paul the sums advanced by St. Paul pursuant to Section 2 hereof. To assure BWI's undertaking to apply the trust funds as aforesaid, BWI will direct each of the owners of Bonded Contracts (with the sole exception of the joint-venture project of BWI with Salloum

Const. Co., Inc., the Student Physical Activities Center in Athens, Georgia (hereinafter the "BWI/Salloum Project), in writing, to forward payments to the Barge-Wagener, Inc. Trust Account. BWI agrees that if any owner on any Bonded Contract, notwithstanding the direction, forwards payment to BWI or delivers payment to BWI or any of its representatives, BWI shall forthwith deposit such payment in the Barge-Wagener, Inc. Trust Account.

6. TRUST ACCOUNTS. All withdrawals from the Barge-Wagener, Inc. Trust Account and the Barge-Wagener, Inc. Trust Account - General, shall require two (2) signatures, one of which will be that of a representative designated by St. Paul and the other of which will be that of a representative designated by BWI. BWI will not, without the written consent of St. Paul, change its signature designee. St. Paul will notify BWI of its designated signatory from time to time. All receivables from owners on all projects involving Bonded Contracts, and all recoveries of funds realized in satisfaction of claims asserted by BWI against any party on Bonded Contracts, shall be deposited into the Barge-Wagener, Inc. Trust Account, excepting only those receivables and recoveries on the BWI/Salloum Project. Any funds advanced by St. Paul for payment of BWI's ordinary monthly general and administrative expenses shall be deposited in the Barge-Wagener, Inc. Trust Account - General. Any BWI excess revenues on non-bonded projects, after payment of all materialmen and subcontractors on said projects, shall be deposited to the Barge-Wagener, Inc. Trust Account - General, as follows: The excess of project cash revenues over project expenses on hand shall be determined at the time of project close-out and deposited, and if later-completed projects should result in deficits, St. Paul agrees

monies in the said Trust Account can be used to cover said deficits up to but not exceeding the total of earlier deposits of excess revenues to the Trust Account. If insufficient funds shall be in the Trust Account when needed to meet this obligation, St. Paul shall fund said deficiencies up to but not exceeding the total of earlier deposits of excess revenues, which obligation shall survive a termination of funding by St. Paul under the other terms of this Agreement. It is understood and agreed that the funds in the Trust Accounts are held in trust and to be used exclusively for the purposes set forth in Section 5 hereof. St. Paul shall have the right in its sole discretion to reduce the indebtedness to St. Paul under this Agreement and related documents by withdrawal from the Trust Accounts of any surplus in said accounts which may occur from time to time. It is understood and agreed that in addition to all other rights hereunder, St. Paul shall be deemed to have a security interest in all monies deposited in the Trust Accounts to secure all indebtedness to St. Paul under this Agreement and related documents, and St. Paul may obtain and file all appropriate instruments to perfect said security interest.

7. TRANSFER OF CONSTRUCTION PROJECTS. Upon demand by St. Paul, BWI agrees to negotiate the transfer of any Bonded Contract designated by St. Paul to a completion contractor named by St. Paul. If BWI fails to successfully enter into an agreement to transfer any such project within a reasonable period of time designated by St. Paul, St. Paul shall have the unilateral right (but not the obligation), at St. Paul's sole and absolute discretion, to negotiate with any potential transferee suitable to St. Paul the terms of the transfer of such project, and BWI agrees to transfer said project pursuant to the terms so

negotiated by St. Paul at BWI's sole cost and expense. St. Paul agrees to advance funds necessary to cover the costs and expenses of transferring said project pursuant to Section 2 hereof.

8. DEFAULT. If BWI shall be adjudicated a bankrupt by a Court, or if BWI shall file a petition in bankruptcy, or if BWI is placed in bankruptcy by its creditors, or if BWI shall be declared in default by the owner on any of the Bonded Contracts, or if BWI defaults under this Agreement, or under the promissory note or notes executed pursuant to this Agreement, in addition to all other rights St. Paul shall have the right, immediately upon the happening of any such event, to withdraw all monies then in the Barge-Wagener, Inc. Trust Accounts and to apply all advanced funds as well as all monies received on any of the projects involving Bonded Contracts, for the payment of bills for labor and materials, and for the prosecution of the work, and for the other purposes set forth in this Agreement, it being further understood that all monies remaining after the application of funds for said purposes shall be utilized to indemnify St. Paul for all advances St. Paul has made, all losses St. Paul has incurred, and all indebtedness owed to St. Paul by BWI. In order to accomplish the aforesaid purposes, BWI will, immediately upon the opening of the Trust Accounts established for the deposit of funds advanced by St. Paul, deliver to St. Paul two (2) blank undated checks, drawn on the Barge-Wagener, Inc. Trust Account, and two (2) blank undated checks, drawn on the Barge-Wagener, Inc. Trust Account - General, each made payable to the order of St. Paul and signed by one of BWI's designated signatories, thereby authorizing St. Paul on the happening of any said events to fill in the dates on said check(s) and to insert for the

amount of said check the full balance then in the Trust Accounts in order to enable St. Paul to withdraw the full amount in said Trust Accounts.

9. ACCESS TO RECORDS. St. Paul shall be entitled at all reasonable times to have access, through its designated representatives, to all BWI's and Indemnitors' business records, of any kind, whether or not directly related to the Bonded Contracts. Specifically, and not by way of limitation, St. Paul shall have the right, before signing any check on the Trust Accounts, to examine original business records and documents (such as subcontracts, purchase orders, invoices and delivery receipts) to determine whether the payments to be made are properly chargeable to the contracts in respect to which they are drawn.

10. BONDING. In consideration of the execution of this Agreement by BWI and Indemnitors, and the fulfillment of the obligations of said parties as outlined herein, St. Paul agrees that it will execute appropriate documentation to bond BWI on Phase II of the Greenville Hospital System project, "Conference Center/Cafeteria Expansion." Said documentation may be in the form of issuance of new payment and performance bonds on the aforesaid "Conference Center/Cafeteria Expansion," or necessary modification of existing bonds in favor of Greenville Hospital System on the "Energy Plant/Site Utilities" project. It is understood and agreed that St. Paul will not issue, and BWI will not request the issuance of, any further surety bonds of any sort.

11. EVALUATION OF WORK. St. Paul may determine, in its sole and unlimited discretion, to employ

engineering, financial and construction consultants and attorneys to advise St. Paul concerning the status and progress of performance of the Bonded Contracts. BWI agrees to cooperate fully with such engineering, financial and construction consultants or attorneys and to provide, to the extent of its authority at each site, free access to the site of the Bonded Contracts and those documents relating to the work including but not limited to, accounting records, contract documents, progress and claim reports. BWI further agrees to indemnify St. Paul as to the reasonable expenses incurred by St. Paul in conducting its evaluation. St. Paul agrees to furnish BWI a quarterly accounting of all such costs and expenses paid or incurred.

12. INDEMNITY. Subject to the limitations of Paragraph 19(A) hereof, BWI and the Indemnitors hereby agree to indemnify St. Paul in respect to any costs and losses sustained by St. Paul in connection with advances of funding to BWI, the Master Promissory Note and any additional promissory notes executed by BWI in favor of St. Paul, and agree that all such costs and losses are encompassed within the terms of the Contractor's General Agreement of Indemnity including but not limited to Paragraph 6.

13. OTHER DOCUMENTS TO BE EXECUTED. BWI and the Indemnitors shall execute all such other documents as may reasonably be requested by St. Paul to effectuate the terms and intent of this Agreement, including, without limitation, financing statements, security agreements, promissory notes, or other instruments contemplated under this Agreement.

14. RELATIONSHIPS OF PARTIES UNCHANGED. The execution of this Agreement shall not change the relationship of principal, indemnitor, and surety which now exists between St. Paul, BWI and the Indemnitors. Nothing contained herein, shall in any way waive, diminish or alter the rights afforded St. Paul under the Contractor's General Agreement of Indemnity previously executed by BWI and the Indemnitors.

15. NON-WAIVER. No delay, omission or failure by St. Paul to exercise any right or remedy accruing to it under this Agreement or otherwise shall constitute a waiver, release or abandonment by St. Paul of such right or remedy.

16. APPLICABLE LAW. The laws of the State of Georgia shall govern the provisions of this Agreement.

17. NO ORAL MODIFICATION OR DISCHARGE. This Agreement, together with the Contractor's General Agreement of Indemnity, and the documents executed pursuant to this Agreement, set forth the full understanding of the parties and cannot be modified or discharged by any subsequent oral understanding.

18. ARBITRATION. Any and all disputes arising out of or in connection with execution or performance of this Agreement, including any breach thereof, shall be resolved through Arbitration in accordance with the Construction Arbitration Rules of the American Arbitration Association. The decision of the arbitrators shall be final and binding upon the parties and enforceable in any court having competent jurisdiction.

19. Notwithstanding any other terms of this Agreement which may be to the contrary, the following terms shall govern and control as to the identified matters.

A. Paragraph 22 of the General Agreement of Indemnity attached hereto as Exhibit "A" which provides for exclusion from the terms of said General Agreement of Indemnity of certain assets and proceeds from assets of Olivia L. Barge is incorporated by reference herein as if restated in full and is hereby reaffirmed and ratified by St. Paul as in full force and effect, and said Paragraph 22 shall not be considered modified, waived, released, limited or otherwise amended by the terms of this Agreement or other documents executed in connection herewith in any respect. The limitations of Paragraph 22 shall apply to any obligations of Olivia L. Barge pursuant to this Agreement, the Master Promissory Note and any other notes executed pursuant to this Agreement.

B. The Individual Retirement Account of John M. Barge at Fidelity Investments, Account No. T-0818433 ("IRA") (Exhibit "F" hereto), in its present amount of approximately $100,000.00 and all future interest and other earnings of said IRA are hereby excluded from the terms of the General Agreement of Indemnity and this Agreement so that said property shall not be subject to levy, garnishment or other satisfaction of any judgment which may be entered in favor of St. Paul on any obligation. No future contributions shall be made to said IRA; if any future contributions are made to said IRA, they and any interest and other earnings thereon shall not be excluded hereunder. No other individual retirement accounts, or profit sharing or pension plans, or interest and other earnings thereon, of John

M. Barge or in which John M. Barge may participate shall be excluded hereunder.

C. St. Paul agrees that any proceeds paid by the Marietta Board of Education on a certain claim for additional compensation submitted by BWI on behalf of Barge Construction, Inc., ("BCI") in connection with New South Elementary School (St. Paul Bond No. 0250) shall be paid to BCI if and when BWI receives payment of same, together with an "Owner's Status Report" stating, inter alia, there are no outstanding claims by the owner, and BCI's Contractor's Affidavit, stating, inter alia, all project bills have been paid and there are no outstanding claims of any sort, without any off-set or other deduction by St. Paul; provided, however, if at the time of such payment to BWI there are any written claims made against St. Paul on the performance and payment bonds or any lien bonds furnished in connection with said New South Elementary School project, and two other projects bonded by St. Paul, Hall County Board of Education, South Hall Middle School (St. Paul Bond No. 0249) and Adairsville Development Authority, Georgia North Industrial Building (St. Paul Bond No. 2801), then so much of said payment as equals twice the amount of such claims shall be placed in an interest-bearing escrow account to stand as security to St. Paul and be used for payment of any actual claims against the performance and/or payment bonds or any lien bonds provided by St. Paul on said projects, and any amount remaining in said escrow account after satisfaction of all such obligations and after said possible exposure has terminated shall be paid to BCI. It is understood and agreed that the prosecution of said claim shall be at no cost to BWI, the Indemnitors or St. Paul and that St.

Paul has no responsibility or liability to anyone in connection therewith.

D. BWI, John M. Barge, John H. Wagener, Olivia L. Barge and Medallion Capital Group each warrant that except as expressly set forth in this Agreement, there are no monies owed by one to the other; that neither BWI nor Medallion owes any monies to any person related by blood or marriage to them; and that no person related by blood or marriage to them owes any monies to BWI or Medallion.

E. For the purpose of this Agreement, the term "general and administrative" shall include but not be limited to payment of payroll, vehicle, equipment and warehouse expenses as necessary for completion of the Bonded Contracts.

20. With regard to the BWI/Salloum Project (the Student Physical Activities Center in Athens, Georgia), the parties hereto agree as follows:

(1) All receipts from the owner shall be deposited in the existing joint-venture bank account at Athens First Bank and Trust, Athens, Georgia.

(2) The checks written on said account must be co-signed by duly authorized representatives of BWI and Salloum Const. Co. Inc. and each party's signature must be original and not a facsimile thereof.

(3) Prior to issuing any checks on said account, each joint-venture partner must review and approve

the documentation submitted in support of the payment and agree that payment is due the proposed payee.

(4) St. Paul shall have the right to monitor said joint-venture bank account and review any and all bank statements, deposit slips, cancelled checks, other bank or joint-venture records and the documentation supporting all checks against the account, either before or after such checks are transmitted to payees.

(5) It is contemplated that from time to time St. Paul in its sole discretion may make advances on behalf of BWI for its joint-venture contribution toward project expenses and costs, and that same shall be deposited in the aforesaid joint-venture account and constitute an addition to the indebtedness of BWI to St. Paul under this Agreement and related documents.

(6) In the event there shall be any distribution or distributions to BWI in the future from the joint-venture, same shall be paid to St. Paul to be credited against BWI's indebtedness to St. Paul.

21. This Agreement, including (1) all exhibits and schedules attached hereto (including inter alia Contractor's General Agreement of Indemnity, Exhibit "A" hereto), and (2) all documents executed in connection herewith by one or more of the parties hereto, and all documents and agreements referenced in the aforesaid Agreement, exhibits, schedules and documents shall constitute the entire agreement between the parties hereto, and all prior written statements and agreements not expressly included herein and all prior and contemporaneous oral statements or agreements are deemed

merged into this Agreement and superseded. This Agreement may not be amended orally, but may be amended, modified, supplemented or waived only by a written instrument executed by the appropriate parties. No waiver of any term or provision of this Agreement shall be effective unless it is in writing, making specific reference to this Agreement and signed by the party against whom such waiver is sought to be enforced.

22. This Agreement, and the terms and conditions hereof, shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

23. This Agreement may be executed in any number of counterpart copies, each of which shall be deemed an original, but which together shall constitute a single instrument.

IN WITNESS WHEREOF, the parties have executed these presents the day and year set forth above.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY

By: /s/ Robert A. Wheeler
Its: Authorized Representative
ATTEST: /s/ Patricia F. Erb

BARGE-WAGENER, INC.

By: /s/ John M. Barge
Its: CEO
ATTEST: /s/ Patricia F. Erb

JOHN M. BARGE, An Individual

/s/ John M. Barge
ATTEST: /s/ Patricia F. Erb

JOHN H. WAGENER, An Individual

/s/ John H. Wagener
ATTEST: /s/ Patricia F. Erb

OLIVIA L. BARGE, An Individual

/s/ Olivia L. Barge
ATTEST:

MEDALLION CAPITAL GROUP,
a Georgia General Partnership

By: /s/ John M. Barge
Its: General Partner

By: /s/ John H. Wagener
Its: General Partner
ATTEST: /s/ Patricia F. Erb

[Attachments have been omitted due to volume]

APPENDIX O

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE,	)	
Plaintiff,	)	
vs.	)	Civil Action No. E-35589
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, and ALVIN BARGE,	)	
Defendants.	)	

ANSWER AND COUNTERCLAIM OF ST. PAUL FIRE AND MARINE INSURANCE COMPANY
(Filed March 31, 1995)

COMES NOW Defendant, St. Paul Fire and Marine Insurance Company ("St. Paul"), and files this its Answer to the Complaint in this action and shows the Court as follows:

FIRST AFFIRMATIVE DEFENSE

The claims and disputes which are the subject of this action are required to be resolved through arbitration under that certain arbitration clause contained in Paragraph 18 of that agreement dated May 18, 1994 ("Agreement") between, among others, Plaintiffs John M. Barge and Olivia L. Barge

and St. Paul (a copy of which, excluding exhibits, is attached hereto and made a part hereof as Exhibit "A"). This arbitration was instituted by St. Paul against John M. Barge and Olivia L. Barge before the American Arbitration Association on January 25, 1995. A copy of St. Paul's Demand for Arbitration is attached hereto and made a part hereof as Exhibit "B". Therefore, this action should be dismissed, or in the alternative, stayed pending the outcome of the arbitration.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have stated insufficient grounds under O.C.G.A. §9-4-1 et seq. for an action for declaratory judgment declaring that no valid agreement to submit to arbitration was made by the parties to this action to arbitrate any dispute relating to tax refunds. Therefore, this action should be dismissed.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs have stated insufficient grounds under O.C.G.A. §9-4-1 et seq. for a declaratory judgment declaring that any security interest or lien purportedly granted by Olivia L. Barge on her interest in tax refunds is void as a matter of law as violating the Equal Credit Opportunity Act, 15 U.S.C. §1691. Therefore, this action should be dismissed.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs have stated insufficient grounds for a stay of the arbitration proceeding commenced by St. Paul against John M. Barge and Olivia L. Barge before the American

Arbitration Association. Therefore, this action should be dismissed.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted.

For the individual numbered paragraphs of the Complaint, St. Paul answers as follows:

1.

St. Paul admits the allegations of Paragraph 1 of the Complaint except for the allegation that St. Paul is a "joint obligor with Defendant, Alvin Barge", and St. Paul states that such agreements as have been executed by St. Paul are the best evidence of their contents, and St. Paul therefore denies the allegations of Paragraph 1 of the Complaint to the extent that they incorrectly or incompletely set forth the terms of said agreements.

2.

St. Paul is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of the Complaint, and accordingly said allegations are denied.

3.

St. Paul admits the allegations of Paragraph 3 of the Complaint.

4.

For answer to the allegations in Paragraph 4 of the Complaint, St. Paul states that the terms of Paragraph of 3(b) of the May 18, 1994 Agreement are the best evidence of their contents, and accordingly the allegations of Paragraph 4 of the Complaint are denied to the extent they incorrectly or incompletely set forth said terms. Further, St. Paul states that Paragraph 3(b) of the Agreement did in fact constitute an assignment to St. Paul of all of Plaintiffs' right, title and interest in Federal and state tax refunds due on or to become due for tax years 1995 and earlier, and for tax year 1996 to the extent that they received payment of any income from Barge-Wagener, Inc. or any affiliate thereof.

5.

For answer to the allegations in Paragraph 5 of the Complaint, St. Paul states that the terms of Paragraph 18 of the Agreement are the best evidence of their contents, and accordingly the allegations of Paragraph 5 of the Complaint are denied to the extent that they incorrectly or incompletely set forth said terms.

6.

For answer to the allegations in Paragraph 6 of the Complaint, St. Paul states that the terms of the Agreement of May 18, 1994 and the "Pledge Agreement - Pari Passu" of May 18, 1994 are the best evidence of their contents, and accordingly the allegations of Paragraph 6 of the Complaint are denied to the extent they incorrectly or insufficiently set forth said terms. For further answer, St. Paul admits that

Exhibit A attached to the Complaint is a true copy of the "Pledge Agreement - Pari Passu" but states that it must be read in context with the May 18, 1994 Agreement and the other documents executed in connection therewith.

7.

For answer to the allegations in Paragraph 7 of the Complaint, St. Paul states that the terms of St. Paul's Demand for Arbitration before the American Arbitration Association are the best evidence of their contents, and accordingly the allegations of Paragraph 7 of the Complaint are denied to the extent that they incorrectly or insufficiently set forth said terms. St. Paul admits that Exhibit B attached to the complaint is a true copy of St. Paul's Demand for Arbitration against Plaintiffs.

COUNT I

Demand for Declaratory Judgment

8.

St. Paul incorporates herein by reference those answers to the foregoing Paragraphs 1-7 of the Complaint with the same force and effect as if they had been restated herein, as St. Paul's answer to the allegations of Paragraph 8 of the Complaint.

9.

St. Paul denies the allegations of Paragraph 9 of the Complaint and states that the Pledge Agreement must be read in context with and as a part of the May 18, 1994 Agreement

and other documents executed in connection therewith, and accordingly any claims or disputes thereunder must be arbitrated in accordance with the arbitration clause contained in Paragraph 18 of the May 18, 1994 Agreement.

10.

St. Paul denies the allegations of Paragraph 10 of the Complaint.

COUNT II

Declaratory Judgment as to Liability of Olivia L. Barge

11.

St. Paul incorporates herein by reference those answers to the foregoing Paragraphs 1-10 of the Complaint with the same force and effect as if they had been restated herein, as St. Paul's answer to the allegations of Paragraph 11 of the Complaint.

12.

St. Paul denies the allegations of Paragraph 12 of the Complaint.

13.

St. Paul denies the allegations of Paragraph 13 of the Complaint.

COUNT III

Application to Stay Arbitration

14.

St. Paul incorporates herein by reference those answers to the foregoing Paragraphs 1-13 of the Complaint with the same force and effect as if they had seen restated herein, as St. Paul's answer to the allegations of Paragraph 14 of the Complaint.

15.

St. Paul denies the allegations of Paragraph 15 of the Complaint.

WHEREFORE, St. Paul demands judgment as follows:

(a) That this Court enter judgment for St. Paul and against Plaintiffs dismissing this action with prejudice;

(b) Alternatively, that this Court direct Plaintiffs to arbitrate the claims asserted in this action, and that this action be stayed pending the outcome of said arbitration;

(c) That Plaintiffs' demand that all arbitration proceedings be stayed pending the resolution of this action be denied;

(d) Alternatively, that this Court find that the tax refunds received to date, and to be received in the future, by Olivia L. Barge are validly assigned to St. Paul and that said assignment is not in violation of the Equal Credit Opportunity Act, 15 U.S.C.A. §1691;

(e) That all court costs be assessed against Plaintiffs; and

(f) That St. Paul be granted such other and further relief as the Court deems just and proper.

COUNTERCLAIM

NOW COMES Defendant, St. Paul Fire and Marine Insurance Company ("St. Paul") and, subject to its contention, and without waiving its claim, that all and disputes between Plaintiffs and St. Paul in this action are arbitrable in the first instance, states for its Counterclaim against Plaintiffs, as follows:

1.

Defendant, St. Paul, is a Minnesota corporation which is qualified to do business in the State of Georgia.

2.

Plaintiffs, John M. Barge and Olivia L. Barge, are residents of Fulton County, Georgia and are subject to the jurisdiction and venue of this Court.

3.

Plaintiffs, John M. Barge and Olivia L. Barge, are two indemnitors among others under a General Agreement of Indemnity dated November 26, 1993 in favor of St. Paul. A copy of said General Agreement of Indemnity is attached hereto and made a part hereof as Exhibit "C".

4.

In reliance on said General Agreement of Indemnity, St. Paul furnished construction surety bonds on behalf of Barge-Wagener, Inc., as principal, now known as 1815 Exchange, Inc. ("BWI"). John M. Barge was at all relevant times to this action a fifty percent (50%) stockholder and chief executive officer and director of BWI.

5.

In the Spring of 1994, BWI, Inc., suffered severe financial difficulties, and sought funding from St. Paul to complete construction projects on which St. Paul had furnished surety performance and payment bonds. BWI, St. Paul, John M. Barge, Olivia L. Barge, and other indemnitors reached an agreement which was memorialized in the May 18, 1994 agreement (the "Agreement", attached hereto as Exhibit "A").

6.

Under the Agreement Plaintiffs, John M. Barge and Olivia L. Barge, assigned all their right, title and interest in certain tax refunds to St. Paul and agreed to pay same to St. Paul. The specific tax refunds assigned are any Federal and

state tax refunds due or to become due for tax years 1995 and earlier, and for the tax year 1996 to the extent that John M. Barge or Olivia L. Barge receive payment of any income from BWI or any affiliate thereof.

7.

Alternatively, St. Paul alleges that under separate documents executed contemporaneously and as a part of the May 18, 1994 Agreement, John M. Barge and Olivia L. Barge granted a security interest to St. Paul in said tax refunds to secure the loans advanced by St. Paul to BWI, et al.

8.

John M. Barge and Olivia L. Barge have received tax refunds to date totaling in excess of Three Hundred Thousand Dollars ($300,000.00) and they are due to receive further tax refunds in the future. John M. Barge and Olivia L. Barge have failed and refused to pay said tax refunds to St. Paul.

9.

Pursuant to the Agreement of May 18, 1994, St. Paul thereafter loaned BWI and its indemnitors sums totaling in excess of Eleven Million Eight Hundred Thousand and no/100's Dollars ($11,800,000.00) and made other expenditures for or on account of BWI for which John M. Barge and Olivia L. Barge are liable, and St. Paul anticipates future loans and/or expenditures of additional monies which will cause St. Paul's loss and John M. Barge and Olivia L. Barge's liability to St. Paul to be in excess of Twenty Million and no/100's Dollars ($20,000,000.00) over and above the value of such security as is available to St. Paul under the Agreement of May 18, 1994 and related documents.

COUNT I

Breach of Contract - I

10.

St. Paul hereby incorporated by reference Paragraph 1-9 of the Counterclaim with the same force and effect as if they had been restated herein.

11.

In failing and refusing to pay the tax refunds received to St. Paul, John M. Barge and Olivia L. Barge have materially breached the May 18, 1994 Agreement, and the other documents executed in connection therewith.

COUNT II

Breach of Contract - II

12.

St. Paul hereby incorporates by reference Paragraphs 1-11 of the Counterclaim with the same force and effect as if they had been restated herein.

13.

John M. Barge and Olivia L. Barge have breached the General Agreement of Indemnity of November 26, 1993 and the May 18, 1994 Agreement and the other documents executed in connection therewith by failing and refusing to

pay St. Paul funds sufficient to repay St. Paul for loans by St. Paul to BWI, et al. and for other monies expended and to be expended by St. Paul for which John M. Barge and Olivia L. Barge are liable.

14.

John M. Barge and Olivia L. Barge are therefore jointly and severally liable to St. Paul for a sum anticipated to be in excess of Twenty Million and no/100's Dollars ($20,000,000.00).

WHEREFORE, St. Paul demands judgment against John M. Barge and Olivia L. Barge as follows:

(a) That this Court enter judgment in favor of St. Paul and against John M. Barge and Olivia L. Barge for the amount of tax refunds each has received to date, plus interest at Eighteen Percent (18%) per annum, attorneys fees and court costs;

(b) That this Court enter judgment directing John M. Barge and Olivia L. Barge to pay any future tax refunds received by them to St. Paul as provided in the May 18, 1994 Agreement and other documents executed in connection therewith;

(c) That this Court enter judgment in favor of St. Paul and against John M. Barge and Olivia L. Barge jointly and severally in an amount in excess of Twenty Million and no/100's Dollars ($20,000,000.00), the specific amount to be proved at trial; and

(d) That St. Paul be granted such other and further relief as this Court deems just and proper.

This 31st day of March, 1995.

Respectfully submitted,
WASSON, SOURS & HARRIS, P.C.

/s/ Edward H. Wasson, Jr.
Edward H. Wasson, Jr.
Georgia Bar No. 739800

/s/ W. Hensell Harris, Jr.
W. Hensell Harris, Jr.
Georgia Bar No. 331600

300 Galleria Parkway, N.W.
Suite 1000
Atlanta, Georgia 30339
(770) 956-1700

Attorneys for Defendant St. Paul Fire
and Marine Insurance Company

APPENDIX P

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE,	)	
Plaintiff,	)	
vs.	)	Civil Action
	)	No. E-35589
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, and ALVIN BARGE,	)	
Defendants.	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,	)	
Plaintiff in Counterclaim,	)	
vs.	)	
JOHN M. BARGE and OLIVIA L. BARGE,	)	
Defendants in Counterclaim.	)	

MOTION TO STAY PROCEEDINGS
PENDING ARBITRATION
(Filed April 24, 1995)

COMES NOW, Defendant and Plaintiff in Counterclaim, St. Paul Fire and Marine Insurance Company ("St. Paul"), and by and through undersigned counsel, files this Motion to Stay Proceedings Pending Arbitration and states as grounds therefor the following:

1.

The claims and disputes which are the subject of this action are required to be resolved through arbitration before the American Arbitration Association under that certain arbitration clause contained in Paragraph 18 of that agreement dated May 18, 1994 ("Agreement") between, among others, Plaintiffs John M. Barge and Olivia L. Barge and Defendant St. Paul. A copy of said Agreement, excluding exhibits, is attached to and made a part of the accompanying Affidavit of Robert A. Wheeler ("Wheeler Affidavit") as Exhibit "B".

2.

Pursuant to said arbitration clause, St. Paul instituted arbitration proceedings against John M. Barge and Olivia L. Barge before the American Arbitration Association, in the Atlanta Regional Office, on January 25, 1995, AAA No. 30-110-00011-95 (the "Arbitration"). A copy of St. Paul's Demand for Arbitration is attached to and made a part of the accompanying Wheeler Affidavit as Exhibit "C".

3.

The Arbitration involves the same Agreement, the same separate documents executed by the parties as a part thereof, and the same fact and legal issues which are the subjects of the Complaint in this action.

4.

St. Paul filed its Answer and Counterclaim in this action subject to and asserting its position that the issues in this action should be arbitrated in the Arbitration and that this action should be stayed pending the outcome of the Arbitration, or dismissed.

5.

The Agreement which is the subject of this action is between a Minnesota corporation, St. Paul, and among others, residents of Georgia, John M. Barge and Olivia L. Barge. The construction projects which are the subject of said Agreement are located in foreign states as well as the State of Georgia, and involve subcontractors, suppliers, and employees from foreign states as well as the State of Georgia. Thus, the Agreement, the projects, and the claims and disputes are within interstate commerce.

6.

Because the Agreement which is the subject of this litigation evidences and was entered into and performed in interstate commerce and contains an arbitration clause, the Federal Arbitration Act, 9 U.S.C.A. §1 et seq., is applicable. Therefore, pursuant to 9 U.S.C.A. §3, this Court should stay these proceedings pending the completion of the Arbitration.

7.

This Court is also authorized to order arbitration and to stay these proceedings under the Georgia Arbitration Act, O.C.G.A. §9-9-6.

8.

A proposed order is attached hereto.

WHEREFORE, St. Paul respectfully requests that this Court enter an Order staying this action in its entirety, including discovery, pending the completion of the

arbitration and requiring John M. Barge and Olivia L. Barge to submit the claims that they have asserted in this action in the Arbitration now pending.

This 24th day of April, 1995.

Respectfully submitted,

WASSON, SOURS & HARRIS, P.C.

/s/ W. Hensell Harris, Jr. for
Edward H. Wasson, Jr.
Georgia Bar No. 739800

/s/ W. Hensell Harris, Jr.
W. Hensell Harris, Jr.
Georgia Bar No. 331600

300 Galleria Parkway, N.W.
Suite 1000
Atlanta, Georgia 30339
(404) 956-1700

Attorneys for Defendant and Plaintiff in Counterclaim St. Paul Fire and Marine Insurance Company

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing **"Motion to Stay Proceedings Pending Arbitration" and proposed "Order"** via U.S. Mail, postage prepaid, and properly addressed to the following:

John A. Christy, Esq.
David H. Flint, Esq.
Schreeder, Wheeler & Flint
16th Floor, The Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845

Dated this 24th day of April, 1995.

WASSON, SOURS & HARRIS, P.C.

/s/ W. Hensell Harris, Jr.
W. Hensell Harris, Jr.
Georgia Bar No. 331600

300 Galleria Parkway, N.W.
Suite 1000
Atlanta, Georgia 30339
(404) 956-1700

SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JOHN M. BARGE and OLIVIA L. BARGE,	)	
Plaintiff,	)	
vs.	)	Civil Action No. E-35589
ST. PAUL FIRE AND MARINE INSURANCE COMPANY, and ALVIN BARGE,	)	
Defendants.	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,	)	
Plaintiff in Counterclaim,	)	
vs.	)	
JOHN M. BARGE and OLIVIA L. BARGE,	)	
Defendants in Counterclaim.	)	

BRIEF IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING ARBITRATION
(Filed April 24, 1995)

COMES NOW Defendant and Plaintiff in Counterclaim, St. Paul Fire and Marine Insurance Company, ("St. Paul"), and by and through undersigned counsel files this Brief in Support of Motion to Stay Proceedings Pending Arbitration and shows the Court as follows:

1. **This Action Should be Stayed Pending Arbitration Pursuant to the Federal Arbitration Act.**

Plaintiffs John M. Barge and Olivia L. Barge are two indemnitors under a general agreement of indemnity dated November 26, 1993 ("Indemnity Agreement") in favor of St. Paul in reliance on which St. Paul provided construction surety bonds on behalf of Barge-Wagener, Inc., as principal, now known as 1815 Exchange, Inc., of Atlanta, Georgia ("BWI"). In the Spring of 1994, BWI, having severe financial difficulties, sought funding from St. Paul to complete construction projects on which St. Paul had furnished performance and payment bonds. BWI, St. Paul,

and John M. Barge and Olivia L. Barge, and certain other parties, reached an agreement concerning funding which was memorialized in an agreement dated May 18, 1994 ("Agreement"). Copies of the Indemnity Agreement and the Agreement are attached to and made a part of the accompanying Affidavit of Robert A. Wheeler ("Wheeler Affidavit") as Exhibits "A" and "B," respectively.

Among other things, the Agreement contains a provision at Paragraph 3(B) which states that John M. Barge and Olivia L. Barge assigned all their right, title, and interest in certain tax refunds to St. Paul and agreed to pay same to St. Paul. John M. Barge and Olivia L. Barge have received certain tax refunds totaling in excess of $300,000.00 and they have failed and refused to pay same to St. Paul.

The claims and disputes which are the subject of this action are required to be resolved through arbitration under

that certain arbitration clause contained in Paragraph 18 of the Agreement.

Pursuant to the aforesaid arbitration clause, St. Paul instituted arbitration proceedings against John M. Barge and Olivia L. Barge before the American Arbitration Association, in the Atlanta Regional Office, on January 25, 1995, AAA No. 30-110-00011-95 ("the Arbitration") to recover said tax refunds and any future tax refunds.

The Arbitration involves the same Agreement, the same separate documents executed by the parties as a part thereof, and the same fact and legal issues which are the subject of the Complaint in this action.

St. Paul filed its Answer and Counterclaim in this action subject to and asserting its position that the issues in this action should be arbitrated in the Arbitration and that this action should be stayed or dismissed. (Answer and Counterclaim, pages 1, 2, 5, 7, and 8).

St. Paul is a Minnesota corporation, and its principal office is in St. Paul, Minnesota. John M. Barge and Olivia L. Barge are residents of the State of Georgia. The construction projects which are the subject of the Agreement are located in foreign states as well as the State of Georgia, and involve subcontractors, suppliers, and employees from foreign states as well as the State of Georgia. Thus, the Agreement, the projects, and the claims and disputes are within interstate commerce. Because the Agreement, which is the subject of this litigation, evidences and was entered into and performed in interstate commerce and contains an arbitration clause, the Federal Arbitration Act, 9 U.S.C.A. §1 et. seq, is applicable. 9 U.S.C.A. §3 of the Federal Arbitration Act states:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such

> arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Therefore, pursuant to 9 U.S.C.A. §3, this Court should stay these proceedings pending the completion of the Arbitration. See Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 765 (1983).

2. **This action should be stayed pending arbitration pursuant to the Georgia Arbitration Act.**

In addition to being empowered and required to stay these proceedings under the Federal Arbitration Act, this Court should stay these proceedings pending outcome of the Arbitration in accordance with the Georgia Arbitration Act, O.C.G.A. §9-9-6.

O.C.G.A. §9-9-6(a) states in part as follows:

> (a) A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. If the court determines there is no substantial issue concerning the validity of the agreement to submit to arbitration or compliance therewith and the claim sought to be arbitrated is not barred by limitation of time, the court shall order the parties to arbitrate. . . . If an issue claimed to be arbitrable is involved in an action pending in a court

having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

Defendant and Plaintiff in Counterclaim, St. Paul, has done all that is necessary to pursue its arbitration remedy, and has filed its Answer and Counterclaim subject to its Demand for Arbitration and insistence that the issues involved in this action be arbitrated in the pending Arbitration commenced by St. Paul. This Court is therefore required to stay this action pending the outcome of the said Arbitration. See Tillman Group, Inc. v. Keith, et al., 201 Ga. App. 680, 411 S.E.2d 794 (1991).

3. **Conclusion.**

For all of the reasons stated above, Defendant and Plaintiff in Counterclaim, St. Paul Fire and Marine Insurance

Company, respectfully submits that this action should be stayed and the Arbitration be ordered to proceed.

Respectfully submitted,
WASSON, SOURS & HARRIS, P.C.

/s/ W. Hensell Harris, Jr. for
Edward H. Wasson, Jr.
Georgia Bar No. 739800

/s/ W. Hensell Harris, Jr.
W. Hensell Harris, Jr.
Georgia Bar No. 331600

Attorneys for Defendant and Plaintiff in Counterclaim, St. Paul Fire and Marine Insurance Company

300 Galleria Parkway, N.W.
Suite 1000
Atlanta, Georgia 30339
(404) 956-1700

CERTIFICATE OF SERVICE

I do hereby certify that I have this date served a copy of the foregoing "Brief in Support of Motion to Stay Proceedings Pending Arbitration," via U.S. Mail, postage prepaid, and properly addressed to the following:

John A. Christy, Esq.
David H. Flint, Esq.
Schreeder, Wheeler & Flint
16th Floor, The Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845

Dated this 24th day of April, 1995.

WASSON, SOURS & HARRIS, P.C.

/s/ W. Hensell Harris, Jr.
W. Hensell Harris, Jr.
Georgia Bar No. 331600

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Atlanta, Georgia 30339
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APPENDIX Q

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

JOHN M. BARGE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	File No.
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,	)	E-35589
	)	
	)	
Defendant.	)	

ORDER

(Filed October 6, 1997)

The judgment of the Court of Appeals of the State of Georgia was made the judgment of this Court on August 1, 1997. As the parties have agreed that no other issues remain in the underlying case, the above-referenced action has been administratively closed, effective August 1, 1997.

This 6th day of October, 1997.

/s/ Elizabeth E. Long

JUDGE ELIZABETH E. LONG
Superior Court of Fulton County
Atlanta Judicial Circuit

cc:
Edward H. Wasson, Jr., Esq.
W. Hensell Harris, Jr., Esq.
300 Galleria Parkway, N.W.
Suite 1000
Atlanta, GA 30339

John A. Christy, Esq.
Debra A. Wilson, Esq.
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